IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1314

WILLIE LEE KILPATRICK, COURTNEY BROWN, HERBERT BELL, SAMUEL HORNE, ALPHONZO JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTES, RULES AND REGULATIONS

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Petitioners, WILLIE LEE KILPATRICK, COURTNEY BROWN, HERBERT BELL, SAMUEL HORNE, and ALPHONZO JONES, each respectfully pray that a Writ of Certiorari issue to review the

opinion of the United States Court of Appeals entered in this proceeding on October 8, 1976, as reported in *U.S. v. Woods et al.*, 544 F.2d 242, 6 Cir., 1976; and the rehearing denied in said proceeding on February 2, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals has been printed, and is located under the entitlement of *United States v. Woods, et al.*, 544 F.2d 242, 6 Cir., 1976; but the opinions of the District Court of the Eastern District of Michigan, filed by HON. PHILIP PRATT and JOHN FEIKENS, U.S. District Judges, sitting in tandem on the lower court cases, have not been reported, but they are contained in the original record which has been supplied to the Court of Appeals in connection with the proceedings had therein. Counsel is requesting that the record be certified and transmitted to this Court on behalf of the instant petitioners.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on October 8, 1976. A timely petition for rehearing was denied on February 2, 1977 (Appendix B). The jurisdiction of the Supreme Court is invoked under the provisions of Section 1254(1), Title 28 U.S.C., and Rules 19(b) and 22(2) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. May Government Attorneys who ultimately conduct the trial of a multiple conspiracy prosecution, in the absence of an intentional waiver, and without notice to an indicted co-defendant's attorney-of-record, call such indicted co-defendant before the Grand Jury, and interrogate him concerning the subject matter of the conspiracy for which he stands formally indicted, and in regard to which he has retained private counsel; and, does such pervasive governmental abuse of the Grand Jury Process, void the convictions of all other alleged co-conspirators, where their trial was affected and tainted by the subsequent testimony of such co-defendant, who testified against the other co-defendants as a government witness?

2. May government trial attorneys having knowledge of an indicted defendant's private retainer of counsel, use on trial, evidence developed as the direct fruit of their surreptititous meeting with said indicted co-defendant, without prior notice by the Asst. United States Attorneys to counsel of record of said attorneys' intention to conduct such meeting with the client; and does such secret governmental invasion of the attorney-client relationship constitute a violation of the Sixth Amendment right to the effective assistance of counsel, and bar, under the due process clause, the use in evidence as against all other co-defendants, of any evidence procured as a result of said meeting, and void their said convictions; and does the taking of such witness before a grand jury, to prepare the government's case for trial, void the convictions.

3. Is a federal grand jury venire rendered fatally defective, under the Fifth Amendment to the United

States Constitution, where the jury clerk whose duty it was to compile the master wheel from which the grand jurors were to be drawn, took papers necessary for the compilation of the master wheel out of the court house and to her dwelling, and engaged the services of her sister, who was not an employee of the court clerk, or authorized to act as such, in relation to the compilation of the jury wheel from which the grand jury which returned the indictments in the within case was drawn; and does the selection of the names for insertion on the master wheel from unauthorized and outdated voting registration lists violate the federal jury selection act, where the jury clerk made absolutely no effort to obtain the proper voters lists, which could have been procured from the county clerk on 24 hours' notice?

4. Can the Attorney General of the United States, in authorizing the making of an application for a wire tap interception order by an Asst. U.S. Attorney, confer such authority by initialing an inter-office memo, without docketing and indexing such authorization as an 'order,' as required by Section 0.180, Title 28, C.F.R., and the provisions of the Federal Administrative Procedure Act, at Section 552(2)(i), Title 5 U.S.C.?

5. May the government create 5 separate and distinct substantive cases of controlled substances violations against the petitioners by arbitrarily subdividing a single quantity of drugs seized from a single address on a single occasion; and does such procedure violate the constitutional prohibitions contained in the double jeopardy clause of the Constitution, and unlawfully impose more than one punishment for the same offense, where, as here, consecutive sentences were imposed upon two of the counts by the sentencing judge?

6. Does the *Pinkerton Rule*, announced in 328 U.S. 640, as applied by the trial court, and affirmed by the court of appeals, as to all appellants, irrespective of the time of their entry into the alleged conspiracy, improperly authorize the blanket punishment of all of the appellants, without any logical agency nexus being shown between the crimes charged and the individual appellant's time of entry into the conspiracy, and without any regard for whether such crimes had been completed prior to his joinder, as in the case of Petitioner Horne, who has been sentenced for offenses transpiring prior to his contact with the alleged conspiracy, at a time when he could not have impliedly, or otherwise, constituted anyone his agent in crime; and is such a rule an ex post facto law, judicially created, in plain violation of Article I, Section 9 of the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Ex Post Facto Clause of the Constitution provides, Article 1, Section 9, Clause 3:

> No bill of attainder or ex post facto law shall be passed.

Amendment V to the United States Constitution provides:

> No person, shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

Amendment VI to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defence.

STATUTES, REGULATIONS, and JUDICIAL PLANS

Jury Selection Act – Section 1861 et seq., Title 28 U.S.C., Section 1863, Title 28 U.S.C., provides that any jury selection plan put into operation in any District in the United States:

> "must comply with the provisions of this title"

Further, the plan put into effect, must:

> "specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of active voters of the political subdivision within the district or division."

Section 1869(c), of Title 28 U.S.C. defines the term "*Voters Registration Lists*", to mean:

> "The official records maintained by State or local election officials of persons registered to vote in either the most recent state or the most recent federal general election."

Section 168.534 of the *Michigan Compiled Laws*, reads:

> A *general* primary of all political parties . . . shall be held in every election precinct in the State on the Tuesday succeeding the first Monday in August

> preceding every general November election, at which time the qualified and registered voters of each political party may vote for . . . U.S. . . . representatives in Congress . . ."

JURY SELECTION PLAN FOR THE EASTERN DISTRICT OF MICHIGAN, FOR RANDOM SELECTION OF GRAND AND PETIT JURORS

Article 2, thereof:

"Management and Supervision of the Jury Selection Process."

The Clerk of the Court shall manage the jury selection process under the supervision and control of the Chief Judge and the Judge of the Division over which he presides.

Random Selection from Voter Lists.

Voter Registration lists represent a fair cross section of the community in each of the Divisions of the Court. Accordingly, names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all political subdivisions within the relevant divisions.

Article 4, thereof:

Master Jury Wheels.

The clerk shall maintain a master jury wheel for each of the divisions within the District. The names of all persons randomly selected from the voter registration lists in a Division shall be placed in the master jury wheel for that division . . .

The master jury wheels shall be initially filled between August 1 and December 1, 1968, and

shall be emptied and refilled between January 1, 1973, and May 1, 1973, and between January 1 and May 1 of every fourth year thereafter.

Article 5, thereof:

Drawing of Names from Master Jury wheels.

". . . The clerk shall prepare alphabetic lists of the names drawn, which lists shall not be shown to any person except as provided herein and in Sections 1867 and 1868 of the Act."

JUSTICE DEPARTMENT RULES

Section 0.180, Title 28 C.F.R., provides:

"All documents relating to . . . the assignment . . . or delegations of authority, functions, or duties by the attorney general . . . shall hereafter be designated as *orders* and *shall be issued only by the Attorney General in a separate numbered series.* Classified orders shall be identified as such, included within the numbered series, and limited to the distribution provided for in the order . . ."

FEDERAL ADMINISTRATIVE PROCEDURE ACT – Title 5 U.S.C.

Section 552(b)(2), Title 5 U.S.C., reads:

Each Agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of the formal or informal procedures available and forms and instructions as to the scope and contents of all papers, reports, or examinations; and

Section 552(b)(3), Title 5 U.S.C., reads:

(continuing from sub section 2) "substantive rules adopted as authorized by law and statements of general policy or interpretations adopted by the agency for public guidance . . ." *A person may not be required to resort to . . . procedure not so published.*"

Section 2516, Title 18 U.S.C.

Authorization for interception of wire or oral communications

The Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a Federal Judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal Agency having responsibility for the investigation of the offense as to which the application is made, . . ."

STATEMENT OF THE CASE

Appellants, who were tried at the same time, by two United States District Judges assigned to jointly hear the testimony, but to separately decide the motions and cases of an equal number of defendants, were adjudged guilty on July 22, 1974, of Conspiracy to Violate the Federal narcotics laws, and of 13 separate offenses committed by various ones of the named defendants.

On October 18, 1974, the appellants herein-named were sentenced as follows:

BY JUDGE FEIKENS:

a) COURTNEY BROWN–
Committed to the custody of the Attorney General for 15 years on Counts 1 thru 12, and 2½ years on Counts 13 to 16 to be served concurrently, and $5,000.00 committed fine on each of 14 counts (p. 64A)

b) HERBERT BELL
Committed to the custody of the Attorney General for 10 years on all counts, concurrently, plus $1,000.00 committed fine on each of 14 counts (p. 65A, entry 1)

c) SAMUEL EUGENE HORNE
Committed to the custody of the Attorney General for 7 years on all counts, concurrently, plus $1,000.00 committed fine on each of 14 counts.

d) ALPHONZO AUGUSTUS JONES,
Committed to the custody of the Attorney General for a term of 7 years on all counts, concurrently, plus $1,000.00 committed fine on each of 14 counts. (p. 65A, entry 6)

BY JUDGE PRATT:

e) WILLIE LEE KILPATRICK
Committed to the Custody of the Attorney General for a period of 6 years, concurrently, on each of 14 counts, under Section 4208(a)(2), Title 18, U.S.C., plus a $2,000.00 fine on the Conspiracy Count #1. (p. 78A, 79A)

The case arose in the Eastern District of Michigan via 16 count indictment filed against a total of 31 persons, sixteen of whom were assigned for disposition to District Judge, JOHN FEIKENS, under Case No. 46597, and 15 of whom were assigned to District Judge, PHILIP PRATT, for disposition under Case #46598. (pp. 194A to 223A)

The gist of the case, set forth in the indictment under Count 1, was that the defendants conspired to illegally manufacture and distribute various quantities of controlled substances, from September 26, 1971 to December 15, 1971, the date of their arrest. They were each made responsible for various substantive transfers of narcotics effected in the Counts labeled 2 through 12, notwithstanding an absence of actual participation on the part of a number of the defendants in those sales, all on the theory that *Pinkerton v. United States*, 328 U.S. 640, authorized the conviction of every convicted conspirator, of every substantive crime committed by any one of the conspirators during its entire lifetime.

They were each convicted, as well, upon Counts 13, 14, 15 and 16, of the offenses of possession of controlled substances, even though the drugs involved in those specific counts were part and parcel of one larger parcel of drugs, including those covered in Count 12, which had been seized at the same time and place, and subdivided so as to make out five separate offenses. By arbitrarily subdividing the single parcel of drugs into 5 separate counts, in all but the appellant WILLIE KILPATRICK's case, the appellants were made to suffer increased and supplemental sentences and punishments; under counts which in truth involved but one violation of the federal statute law.

The following recitation of fact, succinctly made, furnishes the basis for allowance of the appellants' application for issuance of a Writ of Certiorari by the Supreme Court to the United States Circuit Court of Appeals for the Sixth Circuit.

A. On The Quashing Of The Grand Jury

The Indictment in the within case was returned on January 5, 1972, by a Panel of Grand Jurors selected under authority of a Jury Selection Plan adopted July 25, 1968, by the Judges of the Eastern District of Michigan, and approved by the United States Sixth Circuit Court of Appeals, on September 23, 1968, to become effective "on and after December 2, 1968. (p. 1988A)

The Plan was approved as being in conformity with the Federal Jury Selection Act of 1968, 28 U.S.C., Section 1863(a); and, provided specifically for drawing of the Master Jury Wheel from which all Grand and Petit juries would be taken, from the Voters Registration Lists. It provided, significantly for this case, that the first Master Jury Wheel should be filled between August 1, 1968 and December 1, 1968. (p. 1881A)

Rather than obtain the current voting lists which were available to the Clerk from a Computer Run on 24 hours request, and without cost to the Federal Government, the Jury Clerk availed herself of outdated 1967, and prior registration lists in filling out the first Master Jury Wheel (Opinion of Court, p. 311A). She totally disregarded the Jury Selection Act's requirement that the Master Wheel be filled from voters registration lists of "persons registered to vote in the *most recent federal general election.*" (Section 1869(c), Title 28 U.S.C.)

Appellants, by timely motion filed, heard, argued that the use of this outdated list constituted a fatal and substantial violation of the United States Jury Selection Act, and required the quashing of the indictment filed.

For, appellants claimed, there was simply no way whatever for the Clerk to disregard the mandate of the

District Plan adopted by the Court, which stated, in paragraph 3 thereof:

> "Names of Grand and Petit jurors serving on or after the effective date of this plan shall be selected at random from the Voters Registration lists of all political subdivisions within the relevant divisions."

Nor, the appellants claimed, could the Jury Clerk disregard the definition of "Voters Registration Lists," contained in Section 1869(c), of Title 28 U.S.C., which expressly limited those lists to the "persons registered to vote in either *the most recent* state or federal general election."

The District Court held the "most recent" federal election to be that of November 8, 1966. (p. 321A)

On rehearing before the District Court, the petitioners pointed out that a "general federal election," was any statewide election for members of the House of Representatives (p. 1806, 1968, U.S. Code Cong. & Adm. News); and that, further, in Michigan, the 1968 August primary, at which members of the house were nominated, was both "the most recent state and federal election," whose lists were required to be resorted to; and that those lists, under Section 168.497 Mich. Comp. Laws, were available by the Fifth (5th) Friday preceding the day of the August Primary (Tue, August 6, 1968), which works out to be July 1, 1968.

The District Court steadfastly refused to quash the indictment returned by the Grand Jury so selected.

Appellants claim that in view of the Jury Clerk having a full six months in which to compile the master Jury wheel, from the lawful list, she had no excuse for refusing to make use of the 1968 list; and that the District Court erred in not quashing the indictment for this reason.

1. The Jury Clerk's removal of Court Records from the Court to her home, and intervention of unauthorized persons into the jury selection process.

Additionally, as to the Grand Jury Venire, testimony before the Court indicated that the Jury Selection Clerk had not only taken the jury records which were being used to construct the Master Jury Wheel, out of the Court house and to her home, but that she had her sister, who was not a deputy Clerk of the Court, assisting her in the compilation of the Jury Wheel, on Saturdays when the Clerk's office was officially closed.

Of this practice, the District Court, in denying quashal of the indictment, for this reason, said:

> "As to the removal of the records from the Clerk's Officer, this Court is hesitant to discourage employees of the Government from putting in extra hours *on their jobs.* Such virtue is all too rare. Miss Robiscoe, moreover, was not able to determine which records were removed from the office, and thus, we are not able to conclude that the jury lists were removed from the court house." (p. 311A)

But, on page 296A, Ethel Robiscoe's testimony, which remained uncontroverted and unrebutted looms clear and firm. She stated there, that the Jury Clerk, whose sole responsibility was the compilation of the new Master Wheel, took to her home:

> "records that belonged to the Court, and *were being used to compile the Master Wheel.*"

Also, Mrs. Robiscoe testified, on page 278A, without rebuttal, that the Jury Clerk, Jeanne Burge told her that, *"She had her sister coming in and working with her on the selection process."*

Appellants insistently urged that these practices were not only improper, but unlawful, within the ambit of Statutes, Cases, Rules of Court, and the District Jury Plan.

Further testimony indicated that the Chief Clerk of Court had interrogated the Jury Clerk regarding the allegation that she had been taking jury selection papers out of the Clerk's office to her home, and that he advised Mrs. Robiscoe that it would stop. Further, Mrs. Robiscoe testified that thereafter she never saw the Jury Clerk taking any work out of the building. (p. 282A)

The Court Clerk, Mr. Johnson, corroborrated having had such a conversation regarding the Jury Clerk's improper activities with Mrs. Robiscoe. (p. 296A)

Notwithstanding all this direct and circumstantial evidence of the records being "jury selection records," the District Court refused to condemn the Jury Clerk's actions, and persisted in holding the Grand Jury to have been validly constituted under the terms of the Jury selection Act, (p. 311A); while ignoring the *Constitutional principle,* so well outlined in *United States v. Murphy,* 224 *Fed. Reptr.,* 554, on p. 562, that no other person, or official than a United States Clerk, or deputy Clerk, has a right to participate in the jury selection process, and that such participation, to any degree, absolutely voids a jury panel so affected, irrespective of any proof of actual or direct harm.

B. Facts Relative To Prosecutorial Misconduct

1. Misuse of the Grand Jury Process by trial prosecutor in taking an already indicted defendant before the grand jury, without notice to his attorney.

In preparation of its case, the Government committed two very serious acts of prosecutorial misconduct, affecting the integrity of the convictions ultimately obtained.

First, there was a calculated misuse of the Grand Jury Process by the Asst. U.S. Attorney assigned to try the case, together with an unlawful invasion of the attorney-client privilege; and Secondly, there was an improper, clandestine, meeting participated in by the U.S. trial attorney and one of the defendants, George Blair, and his common law wife, resulting in the development of a prosecution witness, and the discovery of evidence used to make out the government's conspiracy case against the appellants.

In the first instance, as appears from the docket entries set forth on pp. 2A, 3A, and 7A of the lower court Appendix No. 1, ROOSEVELT NABORS, was both a defendant, and represented by MILTON R. HENRY, his attorney, from the time of his arraignment on January 7, 1972, up until January 25, 1972, when, without notice to MILTON R. HENRY, the docket entries show the defendant NABORS, who had already been arraigned and released on a $5,000.00 -10% cash bond (p.3A), was "arraigned, *court to appoint counsel,* (p. 12A) in the teeth of a written appearance already filed by MILTON R. HENRY. (p. 2A) The docket entries show on p. 13A, entry 52, that the affidavit and order appointing counsel for the defendant NABORS

was filed and entered on January 25, 1972. Yet, *on January 20, 1972,* while MILTON R. HENRY was fully Attorney of record for NABORS, and without any notice, or hint of notice to said attorney, the Agent in charge of the prosecution, RON GARIBOTTO, took NABORS, the defendant, before the very same Grand Jury which had, on January 4, 1972, already returned the outstanding indictment against NABORS and the other 30 defendants (pp. 1266A, 1267A)

Before the Grand Jury, Nabors was made to testify regarding the facts of the case pending against him and his co-defendants. Nabors testified on pp. 1268A, and 1269A, of the trial, as follows:

Q. Did they go over the facts in the case with you before you went into the Grand Jury?
A. uh . . . They asked me what happened, and I would run it down to them, and – uh – they would be reading on the paper to see was I giving them the accurate truth . . .
Q. . . . They asked you what happened. You were answering but they were reading a report to see what you were saying, *if it was accurate?*
A. Yes, sir.

On page 1273A, the following colloquy is set forth:

Q. . . . When you were talking to them (Grand Jury) and they were going over your testimony, did you give them an account of what happened, and the people you met, yes, or no?
A. Yes, Sir, I did.
Q. When you talked about the people you met, and the people you dealt with, did you describe them by name?
A. Yes, Sir. The ones I knew, I called by name.
Q. Which ones were they?
A. I knew . . . Courtney Brown . . . Bubba Bell . . .

And, on page 1282A, we find:

Q. When you appeared before the Grand Jury, they showed you pictures, is that right?
A. Yes, Sir.
Q. And they showed you pictures which were the pictures of the men arrested with you, is that right?
A. uh – uh – some of them were . . .
Q. Were you shown pictures in the Grand Jury? Did you see pictures of some of these defendants that you saw the day you were arrested and the day you appeared before the magistrate?
A. Yes.
Q. Naturally, when you looked at the pictures before the Grand Jury, you recognized them as the men you were arrested with, and the men you were before the magistrate with?
A. Yes, Sir.

And then, on page 1284A:

Q. What photographs were shown? Weren't you shown any photographs of any of the defendants . . . ?
A. *Mr. Jones . . . Mr. Brown . . .*

then further on:

Q. Tell us again what pictures you were shown in the Grand Jury?
A. . . . *Courtney Brown, . . . "Bubba" Bell, Mr. Jones . . .*"

Special Agent Waber paid Nabors $200.00 for this performance before the Grand Jury, on January 20, 1972. (p. 1264A)

The transcript of the Grand Jury proceedings establishes that ATLEE WAMPLER, the very attorney assigned to try the case at hand, led the questioning before the Grand Jury. His opening question clearly

defined the purpose for Mr. Nabor's appearance there. From page 2 of the transcript we read:

Q. "Mr. Nabors, do you know of *any* of the activities in the field of narcotics and dangerous drugs with an individual by the name of Eddie Jackson,"?

His further inquiries were directed towards information bearing upon the first four substantive counts of the indictment, on which Nabors and all the others had already been arraigned; and upon the overt acts recited in the conspiracy count of the said indictment.

Because such an inquiry was being carried out before a grand jury to further no authorized function of the grand jury, by prosecuting officials charged with trial responsibilities of the case being spread out upon the Grand Jury records; and because, the prosecuting officers, who were reading from a statement *already furnished them by the witness,* were not engaged in discovering any evidence not known to them, and were not engaged in exploring any new or different crime, or crimes, other than those covered in the indictment already issued, the appellants urged, before both District and Appellate Courts, that the prosecutor's action was an abuse of the Grand Jury process, as a means of preparing the government's case for trial, so pervasively improper as to require quashing of the indictment filed against the appellants.

The Court of Appeals avoided the issue, but stated tangentially on page 252 of 544 F.2d:

"Although Atty. Milton Henry filed an appearance on behalf of Nabors as he did for all the other defendants, the Court's records demonstrate that counsel was also assigned for Nabors on January 25, *before* he was called before the Grand Jury."

That statement is 100% unsupported by the record, since Nabors appeared before the Grand Jury *on January 20, 1972,* at which time MILTON R. HENRY was his attorney of record, entitled to full notice of any intended summoning of his client before a Grand Jury.

Further, the Sixth Circuit Court of Appeals failed to pass, in this case on the gross impropriety of the very act of taking an indicted defendant before a grand jury, without counsel, to interrogate him concerning the subject matter of the crime for which he already stood indicted; but, notwithstanding, just 20 days later, announced an opinion in the case of *United States v. Doss,* 545 F.2d 548, in which a conviction was overturned, on *the sole basis* that such a use of a defendant before a grand jury is an unforgiveable abuse of process, proscribed by the Fifth Amendment to the United States Constitution.

Additionally, the Court of Appeals avoided explaining how a retained attorney of record could be unilaterally removed from his retainer, and other counsel appointed in his stead, consistent with the settled practice of law in this country.

On the impropriety of the use of the Grand Jury after Nabors' indictment, the Court of Appeals stated in this case, at p. 249 of 544 F.2d:

> "The government concedes that it is improper to use a grand jury solely to prepare a pending indictment for trial. Beverly v. United States, 468 F.2d 732, 5th cir, '72; 8 Moore's Fedl. Practice, Sect 6.04; But it contends the record shows no support for appellant's claim that Burt and Nabors were called only to prepare pending indictments for trial . . ."

Then the Court cited cases from the 1st, 5th, and 8th circuits to the effect that "Grand Jury proceedings cannot be policed in any detail."

The record before the Grand Jury; and on the trial below, *conclusively* established government misconduct and governmental abuse of process in preparing the within case for trial, by the illegal summoning of Nabors before the Grand Jury to ask him questions about the very indictment under which he had been arraigned in the same Court.

It would be impossible to assign a single proper, or innocent motive to this activity on the part of prosecuting officers. And it is as equal an impossibility to blot out the countless suggestions of impropriety which are conjured up, or to remove the clear conviction that *the only reason the trial attorney and his chief prosecuting officer would become involved in putting Nabors under oath, and in conducting the inquiry themselves,* would be to prepare their witness for trial, and to prevent any possible deviation from the statement which they already had in possession, through the threat of the witness being subjected to a perjury prosecution if he failed to follow the script *on trial.*

Appellants claim that such a use voids the conviction of the appellants.

2. Use of Grand Jury for Prosecutorial purposes; and exploitation of illicit meeting between co-defendant and his wife to procure said wife as a witness against the defendants.

Appellants moved that the District Court vacate their convictions and grant a new trial, among other reasons

assigned, on the ground that the entire trial should have been barred as a result of incurable prosecutorial misconduct amounting to a denial of due process, springing from the government's use of the grand jury as its agent; and because of the government's misconduct in procurement of the witnesses Nabors and Ruth Ann Burt.

Appellants claimed that Burt's testimony was unconstitutionally procured in consequence of the government's knowing misconduct in meeting with the defendant Blair, the witness's husband, without notice to any of Blair's attorneys, and for the purpose and design of obtaining Ruth Ann Burt as a prosecution witness against the other defendants. (Par. 18, of Appellants' Motion for a New Trial) (pp. 104A, 105A)

The trial record (pp. 1477A to 1517A) established that, in the middle of May, 1972, when George Blair was represented by Attorney, Wilfred Rice, U.S. Attorney, ATLEE WAMPLER, and S/A RON GARIBOTTO whose activities via trial preparation, regarding the summoning of known defendants in the case before the Grand Jury have already been outlined above, once more, engaged in less than understandable conduct.

This time, again without notice to the defendant Blair's attorney the U.S. Attorney charged with responsibility for trying the case, and the Chief Agent in charge of the prosecution, met in secrecy with the defendant Blair, and his wife, at the Ramada Inn, some 14 miles outside of the City of Detroit, and near the Metropolitan Airport.

At that meeting, Atty. WAMPLER, and S/A GARIBOTTO, encouraged Blair and his wife to discuss all they knew about the pending case (p. 1479A) and other named defendants. (pp. 1480A, 1483A) Out of

this meeting, and a direct result of contacts established therein, Sgt. Garibotto procured Ruth Ann Burt as a prosecution witness, whose testimony on the trial was materially employed to implicate each of the appellants herein named, in the alleged conspiracy.

This witness, RUTH ANN BURT, was subsequently paid moneys by the Government, and also taken before the Grand Jury by Messers Wampler and Garibotto, on June 6, 1972, to testify in relation to the substance of the case pending against the already indicted defendants. (p. 1532A)

Sgt. Garibotto testified affirmatively, when being questioned as to why he brought RUTH ANN BURT before the Grand Jury on June 6, 1972, when an indictment had already been returned in the case, that his purpose in bringing her before the Grand Jury was "coordinating his efforts with Mr. Wampler in getting the case ready for trial."

His testimony contained on page 1534A leaves little room for doubt as to the prosecutorial use of the grand jury as the government's agency in preparing the pending case for trial.

Viz: *(From page 1534A)*

Q. You didn't make a report on your preparation on identification on June 6th?
A. I've testified that I'm not certain that that occurred on June 6, and if it did, I did not make a record of it.
Q. You didn't make a record of any of those things?
A. I can explain why, Mr. Henry, if you would like.
Q. I guess the Court would be interested in that.
A. Because I considered myself at this point the case was no longer active. I considered myself in the interest of the prosecution. *All I was*

doing was making a witness that I felt the U.S. Attorney would prepare for trial available.

Additionally, this clear cut, unambiguous statement of purpose was elaborated upon on page 1535A.

There we read further:

Q. You knew that in April of 1972 the names of every defendant on this indictment, is that right?
A. Yes
Q. And you knew they were coming up for trial?
A. Eventually, I hoped they would
Q. And you're trying to – you were trying to get your case ready for trial; isn't that what you told me?
A. Coordinating my efforts with Mr. Wampler.

Even in light of the foregoing testimony, the Court of Appeals refused to vacate the convictions of the appellants, where the testimony of the two main witnesses in the case was firmed up and made relatively secure through the prosecution's use of the grand jury solely as an aid to prepare the government's case for trial.

C. Facts relative to the Attorney General's mode of authorization of filing of application with the District Court for an order permitting wire interceptions.

Wire tap evidence was introduced against the appellants, Brown, Bell, and Horne to establish their involvement in the alleged conspiracy; and in fact was the sole evidence in the record against the appellant Horne. Neither appellant Jones nor Kilpatrick appeared on the logs of interceptions by wiretap.

Objections were made, among many, to the validation of the wire tap interceptions where the proofs established that the Attorney General had failed to follow the requirements of Section 0.180, Title 28 C.F.R., which requires that all documents relating to the assignment of duties or authorities, by the Attorney General, be designated as orders, and issued by the Attorney General on in a separate numbered series.

The authorizations in the within case, which were claimed to have been those of the Attorney General, though he made no affidavit to that effect, were contained on inter-office memoranda bearing the initials JNM. The appellants contested the verity of the initials JNM; but, even assuming they were those of the Attorney General, John Mitchell, the appellants contended that the Attorney General had no lawful right to evidence his approval of an application for authority to file for a wire tap order, either verbally, or by initial; and that the exercise of his authority over wire tap authorizations had to be in full conformity with the Rules of his own Department, duly adopted, which in the case of Wire Tap Orders, the appellants claim, must be issued by the Attorney General in 'order' form, as distinguished from some informal, inter-office memo, and in addition must be docketed as such order, as one of a "separate numbered series."

On page 256 of 544 F.2d, the Court of Appeals held that 0.180, Title 28 C.F.R. "is not applicable to delegations of authority over applications for interception orders," citing *U.S. v. Falcone*, 506 F.2d 478, 3rd Cir., 1974, cert. den. 420 U.S. 955, 96 S.Ct. 1339, 43 L.Ed.2d 432, 1977, as standing for the proposition that "even verbal approval by the Attorney General is sufficient;" though in *Falcone*, there was an authorization bearing the Attorney General's name, which had

actually been signed by the executive assistant, Sol Lindenbaum, as well as a file memorandum signed by the Attorney General verifying his instructions to Mr. Lindenbaum to sign his name on the original authorization. (P. 481 of 505 F.2d)

On rehearing of the appeal, wherein the appellants attempted to distinguish their case from *Falcone, supra,* and *U.S. v. Chavez,* 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 38, 1974, the appeals Court simply denied, without any elucidation, the appellants' motion for rehearing.

D. Facts relative to Multiple punishment for a single offense.

The proofs established that, at the time of the arrest of Eddie Jackson, Courtney Brown, and three others, at 19315 Hubbell St., in Detroit, all of the narcotics referred to in Counts 12 through 16 were seized.

Consecutive sentences were imposed on the appellants, Brown, Jones, Bell, and Horne on the Counts 1 through 12, and 13 through 16 by Judge Feikens.

The Appellants objected to their being punished in this fashion, which represented, they claimed, the imposition of more than one punishment upon them for the same offense, in violation of the double jeopardy provisions of the United States Constitution.

The Court of Appeals, on page 251 of 544 F.2d, never reached this claim of the appellants; but, again refused to rule upon it. The Court of Appeals claimed that this objection was waived because it had not been made prior to trial, and until the "government rested its case." (p. 251, of 544 F.2d)

While the matter of *sentence* could hardly be raised *prior to trial,* in any event, it is fundamental that Constitutional questions ought not be sidestepped by Appellate Courts on puny procedural grounds; and that, where the question is raised that the court's action involves an unconstitutional *multiple sentencing* for what was in point of law and admitted fact but *one offense* of possession, the Fifth Amendment, double jeopardy question remains open for review and consideration.

E. Review and Reconsideration of the Pinkerton Rule.

The appellants directly challenged the Rule of *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489, 1946, whereby all of the defendants, irrespective of their moment of entry into the alleged conspiracy, were made criminally responsible for each and every substantive offense which had been committed by any of the conspirators, during its entire lifetime.

The *Pinkerton* case, supra, was 30 years old when the within appeal was announced, and certainly did not consider the ex post facto implications it embraced, as proscribed by Article 1, Section 9, Clause 3 of the United States Constitution.

Yet the Court of Appeals said, on this point, which is particularly important for appellants who were given substantial committed fines on each of the substantive counts involving the crimes committed by others individually:

"Appellants contend that the Pinkerton Rule is bad law, and that our court should not follow it. Our court however, is constitutionally required to follow the Supreme Court's decision in *Pinkerton*, and the cases following it, which have never been over-ruled, or even questioned by the Supreme Court.

The appellants urged that the Pinkerton rule was bad law, and, consistent with the due process, and ex post facto provisions of the United States Constitution, had to be over-turned.

SUMMARY OF ARGUMENT

I.

Petitioners made out a prima facie case of substantial failure to comply with the provisions of the Jury Selection Act of 1968, and, a fortiori, of denial of due process in relation to the Grand Jury which indicted them.

Although the Jury Clerk was required to make use of the 1968 Voters Registration List, under the Jury Selection Act, and had ample opportunity to procure said lists for compilation of the Master Jury Wheel, she made use of an outdated 1967, and prior, list in compiling the Master Wheel from which the Grand Jury which returned the indictment against appellants was drawn.

Further, the Jury Clerk, in compiling the Master Wheel, took official jury selection papers out of the United States District Court Clerk's Office, and to her home; and additionally, allowed her sister to aid her in compiling the Master Jury Wheel from which the Grand Jury Panel was drawn.

Therefore, the Grand Jury was empaneled in clear violation of the Jury Selection Act of 1968, and the District Court Plan, and the Fifth, and Sixth Amendments to the Constitution of the United States; and the indictment filed must be accordingly quashed.

II.

By deliberate design, the Chief Prosecuting Trial Attorney, and the Special Agent in charge of the prosecution, converted the Grand Jury into their agent, and, after arraignment on the indictment returned in the case, took one of the named defendants, represented by counsel, before the Grand Jury which returned the indictment, without notice to his counsel of record, and there interrogated the defendant regarding the substance of the charges already pending against him and contained in the indictment; and thereafter converted him into a government witness, and used his evidence on the trial to convict the other defendants.

In a similar situation, in *United States v. Doss,* 545 F.2d 548, decided 20 days subsequent to the within case by the Sixth Circuit Court of Appeals, another panel of that court announced that it is an abuse of process, and an invasion of the restrictions upon the government's power, to take an already indicted defendant before a Grand Jury to question him about the case for which he stands indicted; and that such action invalidates the trial affected by such tainted activity.

The Petitioners argue that where testimony obtained by Grand Jury interrogation of one of a number of

co-defendants was introduced as evidence at their trial, their convictions must be barred because of prosecutorial conduct amounting to a denial of due process. Cf. *U.S. v. Mandujano,* 425 U.S. 564, 48 L.Ed.2d 212, 96 S.Ct. 1768, on page 242 of 48 L.Ed.2d, 1976; *Lawn v. United States,* 355 U.S. 339, 348, 2 L.Ed.2d 321, 329, 78 S.Ct. 311; *McNabb v. United States,* 318 U.S. 332, 339, 87 L.Ed. 819, 823, 63 S. Ct. 608, 1942.

Petitioners contend that, under the supervisory authority over the conduct of federal prosecutions, if tainted information was used to convict them on trial, they are entitled to either a new trial or dismissal of the indictment, depending upon the circumstances most appropriate. *United States v. Valencia*, 541 F.2d 618, 622, 1976, 6th Cir.

And, petitioners further contend that where the government uses the Grand Jury procedure to prepare its case for trial, a conviction based on evidence so procured cannot be sustained, and must be set aside. *Beverly v. United States,* 468 F.2d 732, 743, 5th Cir., 1972.

III.

Petitioners argue that in the within case, the government procured the testimony of Ruth Ann Burt through an invasion of the attorney client relationship of one of their co-defendants, and through taking the witness Burt before the Grand Jury on June 6, 1972, to question her regarding the events outlined in an outstanding indictment, theretofore returned on January 4, 1972, where the express purpose of taking the witness before the Grand Jury by the Chief trial prosecuting attorney, and the special agent in charge of

the case, was to prepare the government's case on trial, and to "develop" a witness to be used on the trial of the defendants-appellants.

Such an abuse of process bars the use of evidence so tainted, and voids any convictions in which such evidence was allowed to be used, for the reasons set forth hereinabove in the next preceding section of this summary of argument.

IV.

The Attorney General, in approving an authorization for a wire tap, failed to comply with the provisions of his own Rules, promulgated to outline the administrative procedure to be employed by the Attorney General in executing "*all documents*" relating to the assignment by him, of duties or authorities. Petitioners contend that wire tap authorizations must be issued in full compliance with the provisions of Section 0.180, Title 28 C.F.R., and that, insofar as the Attorney General, in this case, did not comply with his own administrative Rules, the wire tap had in the case is void, and suppression of all evidence deriving therefrom is mandated.

V.

At the time of the arrests of some of the appellants, a single large quantity of narcotics was seized by the arresting officers; and this quantity of narcotics was broken up into five smaller quantities of narcotics, and made the subject of 5 separate criminal counts in the indictment. To wit—Counts 12, 13, 14, 15, & 16.

On sentencing of the appellants the trial judge imposed committed fines and consecutive sentences upon each of these counts.

Appellants claim that sentencing them five (5) times for but one violation of the law contravenes the double jeopardy provisions of the Fifth Amendment to the United States Constitution, insofar as a person may not be more than once punished for the same offense.

Appellants claim the Fifth Amendment requires voiding the sentences and convictions imposed in violation of this principle.

VI.

The *Pinkerton* case, of 30 years vintage, which authorizes the punishment of all members of a conspiracy for crimes committed by any one of its members, irrespective of whether the person convicted actually knew about the offense committed, violates the ex post facto provisions of the United States Constitution and due process as well; and especially where the Court below found the petitioners guilty by operation of principles of agency law, of offenses requiring individual knowledge, and individual intent to violate certain statutory crimes; and where, for some of the appellants, their contact with the conspiracy charged, on the very last day of its existence, could not constitutionally validate their conviction of specific intent offenses, committed prior to their association with the perpetrators of those offenses.

Petitioners aver that the Court's blanket conviction of all the appellants of 14 various statutory offenses, in the absence of any proof of their individual personal involvement in those offenses, or knowledge of their

commission, or ratification of them, violates due process; is at odds with the concept of guilt being personal; and is rationally connected with no facts on which an inference of guilt of specific intent crimes could be lawfully premised.

Petitioners aver that Pinkerton, and its doctrines, must be reconsidered, and over-ruled.

ARGUMENT ON THE LAW AND REASONS FOR GRANTING THE WRIT

I.

THE FAILURE TO COMPILE THE MASTER JURY WHEEL FROM THE MOST RECENT VOTERS REGISTRATION LIST READILY AVAILABLE TO THE JURY CLERK, AS DEFINED BY THE JURY SELECTION ACT OF 1968, AND REQUIRED BY THE DISTRICT COURT JURY PLAN, COUPLED WITH THE REMOVAL FROM THE COURT HOUSE BY THE JURY CLERK OF JURY RECORDS BEING USED TO COMPILE THE MASTER JURY WHEEL, AND THE ASSISTANCE IN THE PROCESS OF THE SISTER OF THE JURY CLERK, INVALIDATED THE GRAND JURY SELECTED FROM SAID MASTER WHEEL, AND THE INDICTMENT RETURNED BY SAID GRAND JURY, AS A MATTER OF CONSTITUTIONAL LAW.

The Jury Selection Plan for the Eastern District of Michigan was adopted on September 23, 1968 to become effective 90 days therefrom, that is to say, on and after December 22, 1968. (pp. 1980 to 1988 of appendix)

The provisions of Title 28 U.S.C., sect. 1863, clearly provide that the jury selection plan put into operation in any District "must . . . comply with the provisions of this title."

The statute requires that the plan put into effect must:

> "specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of active voters of the political subdivision within the district or division."

The Plan adopted for the Eastern District of Michigan, in paragraph three (3) thereof, clearly provided:

> Names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all political subdivisions within the relevant divisions.

Section 1869(c), of title 28 U.S.C., clearly defines and limits the term, "Voter Registration Lists" to mean:

> "The *official records maintained* by State or local *election officials* of persons registered to vote in either the most recent state or the most recent federal general election."

The Congressional intent is stated in 1968 U.S. Code Cong. & Adm. News, at page 1806, and it states:

> The definitions of the terms "voter registration lists" and "lists of actual voters" in subsection (c) and (d) are restricted to apply to either the most recent State or the most recent Federal General Election." Your committee intends that a General election be understood as one in which Statewide voting takes place, even if the candidates do not represent all parts of the State. Thus, for example,

> regular election for members of the House of Representatives are "general elections" within the meaning of the bill.

In Michigan, the August primary of 1968, at which members of the House of Representatives were nominated was the most recent State and Federal election prior to the time set for the filling of the Master Jury Wheel hereinvolved.

For, Section 168.534 of the Michigan Compiled Laws provides, in very explicit language:

> A *general* primary of all political parties . . . shall be held in every election precinct in the State on the Tuesday succeeding the first Monday in August preceding every general November election, at which time the qualified and registered voters of each political party may vote for . . . U.S. . . . representatives in Congress . . ."

The *registration lists* for that election, are, by law, *completed* and *closed* on the Fifth (5th) Friday preceding the day of such primary election. (Sect. 168.497 Mich. Comp. Laws) Under these statutes, the primary election date was August 6, 1968; and the date those lists were available was *July 1, 1968.*

Accordingly, the only list of voters available to the jury clerk for compilation of the Master Wheel to be drawn under the Eastern District Jury Plan, was that list of voters in the hands of the election officials on July 1, 1968.

The proofs adduced upon hearing held in the District Court established that the election officials could furnish a computer run of the registration list within 24 hours, and that the costs of such run could, and would, be waived for the federal government. (p. 225A, 233A)

The Master Wheel was ordered to be filled during the period of August to December of 1968. Certainly,

where the registration list of persons registered to vote in the most recent federal or state election was in existence and in the hands of local election officials as of July 1, 1968, fully a month prior to the time when the judges of the district said the wheel was to be filled, and fully six months prior to the operative date of the plan, the failure to use the proper list constituted a wilful and deliberate disregard of the Congressional mandate and intent, and the letter of the applicable law.

Every case to date, in which this issue has been raised, until now, has stated, in substance, that, at the time of the filling of the master jury wheel, the jury clerk *must* use the *most recent* federal or state general election registration list, *unless* there existed "no alternative list readily and practically available."

That is the clear import of *U.S. v. Guzman*, 337 F. Supp. 140, 145; 468 F.2d 1245, cert. den. 410 U.S. 937. That is the clear import of *U.S. v. Blair*, 470 F.2d 331; and of the District Court cases of *U.S. v. Deardorff*, 343 F. Supp. 1033, 1042; and *United States v. Matthews*, 350 F. Supp. 1103, 1110. Each of these decisions insures that, at the time of the filing of the Master Jury Wheel, the clerk *must* resort to the most recent "official records" available in time to permit compliance with the statutory language.

At the hearing of appellants' motions to quash the indictments, it clearly appeared that the Master Wheel from which both grand and petit juries hereinvolved was constructed and derived, was put together during the August to December 1968 period, and that the Jury Clerk responsible for its compilation took names from either 1965 or 1967 copies of lists furnished her by the Jury Commissioners of the Detroit Recorders Court. (p. 244A, 251A, 257A) No effort was made by the jury

clerk to obtain the 1968 registration lists from the election officials.

In addition, ETHEL ROBISCOE, testified that the jury clerk, JEANNE BURGE, not only took home "records that belonged to the Court and were being used to compile the master jury wheel," (p. 296A) but that while the wheel was being compiled, the responsible clerk had her sister, who was not an assistant court clerk, or a federal employee, come to the federal building, on Saturdays to assist in the compilation. (p. 278A, 279A) No testimony anywhere denied these averments.

That testimony is worth reciting here:

(From page 278 of Appendix):

Q. All right, Now, then, you know of your own knowledge that she took home *work having to do with the selection of that master panel.*

A. Definitely.

Q. With her?

A. *I saw her put them in her attache case,* and I went home with her. I would go home with her everyday, to take the same bus, and that case used to be so heavy that she could hardly make it.

Q. Then she would bring that work back, and whatever happened to it while she was at home, you wouldn't know?

A. No.

Q. Did she ever tell you that she had anybody else *working with her on the selection process*?

A. She told me that she had somebody come in to, down here to work. She said she would come down often on Saturday mornings and somebody would unlock the door, or the guard would let her in and she had her sister coming in and *working with her*. And I asked

her at the time if she was employed here, and she said, "No", she would come down and *help her.*

Q. She was not a jury clerk?
A. No, sir.
Q. Not employed by the Clerk?
A. No, sir.

And then, from the bottom of page 282A of the appendix:

Q. Did you ever talk to her about taking the work, *the jury lists* home?
A. She had to do the work at home– she didn't say she had to, she said she *was* doing the work at home.
Q. Did you ever report that to anybody in authority?
A. Yes, sir.
Q. Who did you report it to . . . ?
A. Mr. Johnson.
Q. And what, if anything, occurred when you reported it to Mr. Johnson?
A. I think he said, "Well, it would stop." And, I asked him if it was allowable to take material out of the jury office there and out of the building into your home, and he said, "No." He said then, "It will stop," but I think she did stop it *after that . . . I don't recall her taking her attache case out any more.*

Added to this testimony was that of Mr. Johnson, the Court Clerk for eight and one half years, who said, on page 296A of the appendix:

Q. . . . As a matter of fact, Mrs. Robiscoe told you did she not, that Jeanne Burge was taking home *records that belonged to the Court and were being used to compile the master jury wheel?*
A. I believe she brought that up, yes.

In light of the foregoing testimony, there can be no doubt but that the appellants proved that the Jury Clerk had removed critical jury selection records, and none other, from the Clerks office during the compilation process, and that she had had her sister, who was not a clerk working on those records.

In any event, there was never offered any evidence to the contrary by the government. In fact, throughout, the government has brazenly admitted the occurrence and suggested its propriety.

The government attorney's argument plainly admits an appreciation for the proof of those facts, note the language of Laurence Leff on page 108 of the trial transcript of May 15, 1972 (Not included in the appendix):

> I think the attempts to find some fault, some impropriety in the conduct of the jury clerks and the employees have fallen far short of their mark. *I see nothing, I can find nothing in the Statutes . . . that bars a diligent worker from taking home paper work* and doing typing at home, with the knowledge of the Court . . ."

The government's attorney, elected however, quite understandably not to comment upon the second prong of the defendants' objections, namely, that the jury clerk had brought an unauthorized person, her sister, into the jury selection process, and had thereby irreparably tainted it.

Long ago, in 1915, a federal court in New York had to throw out a jury panel because a U.S. Attorney, not authorized to be involved in the Jury Selection process became so involved, along with a secretary needed to assist in the compilation.

In voiding the panel, the Court said, in *United States v. Murphy*, et al., 224 Fed. Reptr. 554, on page 562:

> It is evident from the reading of the statute that the selection of names to go in the jury box is to be made by the commissioner of jurors and by the clerk of the court. . . . *No other person or official has the right to participate in such selection*. . . . There should be no question that the selection was made by those in whom the power is vested. To this end statutory directions as to the selection of jurymen should be followed in all essentials, unless they relate to mere form of procedure, and even in such cases a departure therefrom . . . has been fatal to the entire panel.
>
> In criminal cases, especially, it is all-important that all legal safeguards provided by the Legislature of the State, if we are in State courts, or by acts of Congress, if we are in the United States Courts, be observed.

And, on page 564, the Court said:

> But, behind and underlying all is the general principle, universally recognized, that the courts cannot justly or safely permit or sanction any participation by unauthorized persons . . . in the selection of names of persons to go on the jury lists, or in the jury boxes, from which panels for service are to be drawn, no matter how high-minded and conscientious the purpose of the party participating . . . , Courts cannot stop to inquire in each case whether such participation, *however indirect,* has been harmful in a given case. *The only safe rule is to prohibit and condemn it absolutely.*

To like effect is *U.S. v. Roemig,* 52 F. Supp. 857, 861, DC ND Ia, 1943; and *Glasser v. United States,* 315 U.S. 60, 85, 86 L.Ed. 680, 62 S.Ct. 457. Section 1863(b)(1) and 1863(b)(3) of Title 28 U.S.C. require that the selection process be carried out by the "clerk" of court. The jury plan, in paragraph 4, thereof,

requires the "clerks" to make up and "maintain" the Master jury wheel.

"Clerk" is defined in Section 1869, Title 28 U.S.C., as meaning "a Clerk of the District Court of the United States, or any authorized *deputy clerk.*"

Neither the Act, nor the Plan vests any authority in anyone other than a "Clerk" to interfere in the compilation of the Master Jury Wheel. What was done here was plainly fatal to the drawing of a master wheel, and any grand jury selected from the tainted wheel is unlawfully selected and void.

On page 5 of the slip opinion filed by the Court of Appeals herein, the Court stated:

> "We decided these identical issues in United States v. McNeal, 490 F.2d 206, 6th cir., 1973, cert. denied, 419 U.S. 1020 (1974). At the District Court level, the parties in McNeal stipulated that precisely the same challenges to the grand jury venire had already been submitted to Judge Feikens and to Judge Pratt in the Kilpatrick and Jackson cases. The parties in McNeal agreed to be bound at the district court level by the rulings of Judge Pratt and Judge Feikens, and in accordance with their rulings, the district court denied the motion to quash the indictment in McNeal. On review we held that "there was no substantial failure to comply with the provisions of the Act." 490 F.2d 207. We hold that our determination in McNeal is dispositive of these appeals as well, since not only the same issues but also the same facts giving rise to them are before us again."

The appellants claim that the issues raised in *United States v. McNeal,* 490 F.2d 206, 6 Cir., 1973, cert. den. 419 U.S. 1024, 1974, and decided in that case can in no way bar them from a hearing thereon in the within appeal. When the Court of Appeals stated, as it did, on

page 5 of its slip opinion, that "the parties in McNeal agreed to be bound by the rulings of Judge Pratt and Feikens," that comment is one hundred percent erroneous.

The parties in this case, made no such stipulation. Rather, *McNeal,* who was *a sole defendant, in his case* stipulated that *he* would be bound by the rulings of Judge Pratt and Feikens which might be made in the Jackson case on the jury quashal issue.

That stipulation could in no way be binding upon the appellants here. They made no such commitment. They did not agree to relinquish their rights to challenge, on their own independent appeals, any error which might be made by Judges Feikens and Pratt. Those defendants had a sacred, inviolate right to make their own appeals; and those rights are personal to these appellants, and can not be affected by anything McNeal, or any other litigant might do in relation to his own separate cause.

Further, the Supreme Court denied the McNeal application for Certiorari, because his petition was untimely filed, on the 90th day, under a misapprehension regarding the 30 day limit which applied in criminal rather than civil cases.

But, even if it had been timely filed, McNeal's denial of certiorari did not establish the law of this case, nor amount to res judicata on the points raised. *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 34 L.Ed.2d 577, 99 S.Ct. 647, 1973, on page 581 of 34 L.Ed.2d, footnote #1. A denial of certiorari imparts no implication or inference concerning the merits of a case. *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 919, 94 L.Ed. 562, 70 S.Ct. 252 (Frankfurter, J.). *United States v. Kras,* 409 U.S. 434, 34 L.Ed.2d 626, 93 S.Ct.

631; *Farr v. Pitchess,* 409 U.S. 1243, 34 L.Ed.2d 655, 93 S.Ct. 593.

Moreover, the Sixth Circuit, has never passed upon the issues raised by the appellants appeal herein. The fact that they may have been presented in the McNeal appeal, has nothing whatever to do with what the Sixth Circuit elected to rule on. Specifically, the Sixth Circuit, in McNeal never uttered a word passing upon McNeal's challenge that the jury selection process had been invaded by private persons. Their bare assertion that "there was no substantial failure to comply with the provisions of the Act," is meaningless, and cannot operate as a catch all to prevent any further inquiry into the specific manner in which the jury selection process violated the *Fifth Amendment* of the Constitution. Nowhere in the *McNeal* decision was any attention whatever paid to the claim that the taking of jury papers home by a jury clerk, violated not only the jury selection act, *but also other provisions of federal law, and the Constitution as well.*

Moreover, and even worse, the Sixth Circuit, in *McNeal* plainly refused to acknowledge that the jury selection process had been invaded, and said, *in the very face of contrary facts,* on page 207 of 490 Fed. 2d, "there is no evidence she played any role in choosing names for the jury wheel." Any fair reading of the *McNeal* decision makes clear that the Court is obligated *in the within cause* to clearly and plainly pass upon the due process claims regarding the jury selection defects, as well as the manner in which those defects relate to the Sixth Amendment right to a fair trial; and that the Supreme Court is not barred from reviewing what has occurred in the District and Appellate Courts.

Few issues are of more transcendant nature than question of the proper method of selection of Grand and Petit Jury Panels.

The abuses which have occurred in the within case, are grievous. They are not such as can be lightly passed over. The sentences imposed upon these numerous petitioners by the District Court were as serious as life sentences–they in fact, represent deprivations of liberty far greater than would be found in most murder cases. A decent regard for human liberty, requires that the Supreme Court review the matters herein raised.

If *Glasser v. United States, supra,* which absolutely proscribes private participation in the jury selection process is no longer the law, then it would seem the Supreme Court ought to say so.

On the other hand, in this case, the Court of Appeals denied relief from *Pinkerton v. United States,* 328 U.S. 640, 1946, on the basis that it was "constitutionally required to follow the Supreme Court's decision . . ." (Page 39, slip opinion, appendix) yet, did not feel inclined to follow *Glasser v. United States,* in regard to its declarations on the jury selection process.

Thus, the Sixth Circuit has followed the Supreme Court's rulings when it suited their purposes, and has disregarded their rulings when that suited their purposes. *Such arbitrary disinclination to apply the law is itself a denial to the appellants of their right to a review,* and a fair review; and this type of thing will continue on and on, unless the Supreme Court, every now and then, grants certiorari, to provide helpless litigants with a remedy for their helplessness. And that reason is, beyond any question, the most important reason why certiorari should be granted in the within case, on this point raised by petitioners. The *McNeal*

opinion, as anyone who reads the English language can plainly see, touches *only* upon the *Jury Selection Act,* not the Fifth Amendment, or any part of the *Constitution.*

It should be helpful if the government would explain just how *McNeal,* which doesn't say one thing about the Fifth Amendment, can be used to bar the appellants herein from claiming that the activities of the jury clerk violated their rights under the Fifth Amendment, and other provisions of the *Constitution* of the United States.

These defendants-appellants haven't stipulated to be bound by the ruling in McNeal. They have an independent personal right to have their objections ruled upon by the Court to which they have elected to make their appeal.

These appellants do not ask the Court to "re-publish part of its earlier opinion" since no part of the earlier opinion deals with the question of whether the actions of the jury clerk violated the United States Constitution.

It was more than unfair for the Court of Appeals to decline to firmly answer the question raised by these petitioners as to whether the clerk's activities violated the *Constitution,* under the circumstances here appertaining, where *there is no decision of the Sixth Circuit* declaring upon *that issue,* and there can be no collateral estoppel of these appellants by virtue of such prior judicial precedent.

As pointed out by the Supreme Court in *Sanders v. United States,* 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068, denial of relief in a prior proceeding can only be given effect in a subsequent one if the prior decision contained an adverse holding "on the *same grounds*"

raised in the subsequent case. (p. 16 of 373 U.S., p. 161 of 10 L.Ed.2d) "The prior denial must have rested *on an adjudication of the merits of the ground presented in the subsequent application.*" Further the Supreme Court pointed out, "Even if the same ground was rejected on the merits of a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground."

The issue of the clerk involving her sister in the jury selection process, or taking jury records out of the court house to her home, as demonstrated by the record in the within appeal, has never been ruled upon by any appellate court; but the Fifth Circuit, in *United States v. Davis*, 546 F.2d 588, 1977, has recently held, on page 591 that:

> "The day has passed when all the work of the Clerk's office could be done by its personnel, normally performing each mechanical step of every routine task."

This conflict between Circuits, on a matter of such recurring importance between and among them, requires allowance of certiorari to bring clarity in an area affecting every litigant before the Courts.

II.

THE UNITED STATES ATTORNEY'S TAKING OF THE WITNESSES NABORS AND BURT BEFORE THE GRAND JURY AFTER INDICTMENTS HAD BEEN RETURNED AGAINST THE PETITIONERS, FOR THE PURPOSE OF INQUIRING INTO THE MATTERS CHARGED IN THE INDICTMENT, CONVERTED THE GRAND JURY INTO THE GOVERNMENT TRIAL ATTORNEY'S AGENT, AND WAS AN ABUSE OF PROCESS SO GRAVE AS TO INVALIDATE ANY CONVICTIONS BROUGHT ABOUT BY THE USE OF EVIDENCE DERIVING FROM SUCH GRAND JURY INTERROGATION, AND THE SUMMONING OF THESE WITNESSES TO APPEAR BEFORE THE GRAND JURY CONSTITUTED PROSECUTORIAL MISCONDUCT AMOUNTING TO A DENIAL OF DUE PROCESS.

In May of 1976, the Supreme Court, in *United States v. Mandujano*, 425 U.S. 564, 48 L.Ed.2d 217, 96 S.Ct. 1768, made clear, on p. 220 of 48 L.Ed.2d, that:

> "... The Grand Jury's mission, is after all, to determine whether to make a presentment or return an indictment."

In that case, which dealt with whether a perjuror before a Grand Jury could object to being questioned in the absence of Miranda warnings, the Court held such warnings inapplicable, since the Sixth Amendment right to counsel did not come into play until a person appearing was a defendant in a criminal case. (p. 225, of 48 L.Ed.2d)

In a concurring opinion, Mr. Justice Brennan pointed out, on page 230 of 48 L.Ed.2d:

"We must note that the nature of the grand jury is of course primarily inquisitional *rather than adversarial:* the grand jury is "a grand inquest, . . . with powers of investigation and inquisition."

On page 233 of 48 L.Ed.2d, the Court plainly stated:

"It is clear that the government may not, in the absence of an intentional waiver, call an indicted defendant before a grand jury, and there interrogate him concerning the subject matter of a crime for which he already stands indicted. Lawn v. United States, 355 US 339, 2 LEd2d 321, 78 SCt 311, 1958. . . . *The Fifth Amendment requires suppression of any statements of the accused that were so obtained.*

Most importantly, the Court held, that while the public has a right to every man's evidence, citing *U.S. v. Nixon,* 418 U.S. 683, 709, 41 L.Ed.2d 1039, 94 S.Ct. 3090, 1974, that right "*must yield in situations risking vast potential for abuse in the absence of further safeguards calculated to preserve the policies underlying our adversary system.*" (p. 233, 48 L.Ed.2d)

The Court further said, on page 233 of 48 L.Ed.2d:

There can be no doubt that sanctioning unfettered discretion in prosecutors to delay the seeking of criminal indictments pending the calling of criminal suspects before grand juries to be interrogated under conditions of judicial compulsion runs the grave risk of allowing "the prosecution (to) evade its own constitutional restrictions on its power, by turning the grand jury into its agent." (U.S. v. Mara, 410 US 19, 29, 35 LEd2d 99, 93 SCt 774, 1973).

Finally, on page 242 of 48 L.Ed.2d, Mr. Justice Stewart, pointed out that only because the grand jury testimony was not made use of upon the trial of the

accused he would permit a conviction for perjury; but, the clear implication of his language was that, where testimony adduced before a grand jury, under circumstances where a prosecutor is using the grand jury as his agent, is offered on a prosecution, a conviction obtained cannot stand, because the prosecutorial misconduct, under these circumstances, amounts to a denial of due process.

In the within case, the record is clear, and undisputed, that the witness Nabors was arraigned as a defendant on the very indictment under which the convictions here contested were had.

As pointed out hereinabove in the Fact Statement B-1, Nabors was represented by privately retained counsel, from his arraignment on January 7, 1972, until January 25, 1972, when, without notice, or hearing, other counsel was appointed by the Court.

While Milton Henry was attorney of record, and before any such appointment was made, the trial attorney assigned to handle the over-all prosecution, ATLEE WAMPLER, and the S/A in charge of the case, took the defendant Nabors before the Grand Jury, and had him testify to facts bearing on the outstanding indictment. They asked about other co-defendants; sought specific information regarding the claims contained in the indictment; sought the identification of photographs of co-defendants. Then, Nabors appeared as a witness for the prosecution, on the trial of the petitioners. The statement of facts appended hereinabove, with references to the trial record, establishes that the sole questioning of Nabors before the Grand Jury was aimed at eliciting information from him regarding the subject matter of the charges contained in the outstanding indictment, of which he was a part.

In like vein, although she was not a defendant, the witness Burt, was taken before the Grand Jury on June 6, 1972, by the same two government prosecutorial officers, to testify regarding her knowledge of the events described in the indictment. She thereafter repeated her testimony upon the trial of the petitioners, substantially repeating exactly what she had told the grand jury.

S/A GARIBOTTO admitted that his purpose in calling the witness Burt before the Grand Jury was to "get the case (represented by the indictment) ready for trial," His statement contained on page 1534A of the record to the effect that "All I was doing was making a witness that I felt the U.S. Attorney would prepare for trial available," leaves no doubt of the purpose of calling these persons before the Grand Jury.

And, such an admitted use of the Grand Jury fatally taints all the evidence obtained thereby; and convictions made possible through the use of such evidence cannot be sustained, within the meaning of due process of law.

In the Fifth Circuit, in the case of *Beverly v. United States,* 468 F.2d 732, 5th Cir., 1972, it was clearly decided that the Grand Jury cannot be used by the government to prepare a pending case for trial.

In the within case, notwithstanding the expressions of S/A GARIBOTTO that he and ATLEE WAMPLER were preparing their case for trial, the Court of Appeal for the Sixth Circuit declined to vacate the petitioners' convictions on the ground that *United States v. Doe,* 455 F.2d 1270, 1274, 1st Cir., 1972, precluded the "policing of grand jury proceedings in any detail."

Yet, less than a month after denying the petitioners relief from their convictions, the Sixth Circuit, in the case of *United States v. Doss,* 545 F.2d 548, announced

that the government may not "use the grand jury as a discovery instrument in a case where an indictment has already been handed down, and the case is awaiting trial." (p. 550 of 545 F.2d)

Further, the Court said even more definitely, in that case:

> "When a person under our system of law has been indicted for crime, the government has no more right to call him before a grand jury and question him about that crime than it has to call an unwilling defendant to the stand during trial of the case. U.S. v. Lawn, 115 F Supp 674, 677, (SDNY, 1953) (p. 551 of 545 F2d)

Even more, the Court in *Doss* held that:

> "When a substantial purpose of calling an indicted defendant before a grand jury is to question him secretly and without counsel being present. . . . the proceeding is an abuse of process which violates both the Sixth Amendment and the due process clause of the Fifth Amendment."

And, that is what we have here.

The government had absolutely no right to talk to Nabors without first notifying his attorney of record. This action was a deliberate disregard of all principles of fair play and justice, inherent in due process.

In *McNabb v. United States,* 318 U.S. 332, 87 L.Ed. 819, on pp. 339 of 318 U.S. (p. 823 of 87 L.Ed.), we read:

> "It is true, as the petitioners assert that *a conviction* in the federal courts, *the foundation of which is evidence obtained in disregard of liberties deemed fundamental* by the constitution, cannot stand."

And, on page 343 of 318 U.S. (p. 825 of 87 L.Ed.):

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process."

As in *McNabb* the court said the circumstances under which the statements admitted in evidence were secured revealed a plain disregard of the duty enjoined by Congress upon Federal Law Officers, so here the testimony of Nabors and Burt; procured through an abuse of the Grand Jury process cannot support the convictions of any of the petitioners.

And that principle seems to have been recognized and applied by the Sixth Circuit in their case of *United States v. Valencia,* 541 F.2d 618, 6th Cir., 1976, where the Court threw out convictions entered against all conspirators, because of the use of evidence procured through a violation of the attorney client privilege.

In light of these cases and the apparent conflicts between and among the courts, and within the same circuit, the Supreme Court should consider granting certiorari in favor of the petitioners.

III.

THE SECRET MEETING HELD BY THE GOVERNMENT TRIAL ATTORNEY WITH GEORGE BLAIR, A DEFENDANT, AND HIS WIFE, RUTH ANN BURT, CONSTITUTED PROSECUTORIAL MISCONDUCT REQUIRING SUPPRESSION OF HER TESTIMONY ON TRIAL, WHEN TAKEN IN CONJUNCTION WITH THE GOVERNMENT'S USE OF HER BEFORE THE GRAND JURY AFTER THE RETURN OF THE INDICTMENT IN THE CASE, AND THE RIGHTS OF ALL THE DEFENDANTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL PROSECUTORIAL FAIRNESS.

The meeting of U.S. Attorney Atlee Wampler, S/A GARIBOTTO, and other special agents, with the appellant GEORGE BLAIR, as described on pages 1477 to 1517 of the appendix, without prior notice to, or consent from defendant BLAIR's retained attorney; and the inclusion of a confidential informant among the indicted defendants, as a sham defendant, are each "shocking" to the concept of due process, and fair play.

It need hardly be reiterated that a prosecutor's duty is to serve the interests of the state in securing the conviction of those who violate the law; and, on a concomitant parity with such duty is the duty to conduct his office so as to always insure justice for those subjected to prosecution. His paramount duty is to seek justice–not to convict. This duty he owes the accused is affirmative. *McDonald v. Musick,* 425 F.2d 373, (9th Cir., 1970); Canon 7, Code of Professional Responsibility; ABA Canon 5; *Berger v. U.S.,* 295 U.S.

78, 79 L.Ed. 1311, 55 S.Ct. 641, 1935; Accord, ABA Opinion 150, 1936.

The meeting arranged by Atlee Wampler, who was an United States Special Justice Department Attorney assigned to Detroit's Organized Crime Office, and was charged with responsibility for prosecution of the defendants, with GEORGE BLAIR, who was one of the defendants, and with several other DEA Agents on the case, in the secrecy of the RAMADA INN, near Metro Airport, in the absence of counsel, violated, in every respect, the constitutional rights of all the defendants in the case the effective assistance of counsel. This was no ordinary case, but a conspiracy case, in which information against BLAIR could become incriminating as against others connected in any sense with him. This fact was surely known to Atlee Wampler when he acted to participate in setting up such a meeting.

The alleged consent, or waiver of counsel by BLAIR is not significant, or determinative of the issue, which must focus not upon BLAIR's willing participation, if any, but upon the patent wrong of the chief prosecuting attorney for the government in getting his case ready for trial. BLAIR's waiver of counsel is immaterial to the constitutional requirement of the presence of counsel, or notice to him, prior to engaging in confrontation with BLAIR, or any of the other defendants for that matter. Judge Friendly, in *United States v. Bennett*, cca 2 1968, 409 F.2d 288, 290, graphically illustrated the function of counsel for a defendant, in words of particular appropriateness here:

> Counsel is rather to be provided to prevent a defendant himself from falling into traps devised by a lawyer on the other side and *to see to it that all available defenses are preserved.*

The concept of the right to the effective assistance of counsel embodied in the Sixth Amendment requires at the very minimum the notification of retained counsel by opposing counsel whenever a represented defendant contacts the opposing counsel. In *State v. Britton*, 203 S.E.2d 462, Supr. Ct. of W. Va., the Court roundly condemned such surreptitious conduct by the prosecutor. Language from that case needs repeating:

> "To insure a fair trial, a prosecutor should not counsel with the accused who is represented by his own attorney, in the absence of that attorney, concerning aspects of the pending prosecution against the accused."

By meeting with the defendant BLAIR, without notice to his retained attorney, Atlee Wampler became conveniently aware of not only BLAIR's relations and activities; but of BLAIR's relations with other defendants, and also with the affairs of other represented defendants as well. This secret confrontation brought forth and produced information from BLAIR and his common law wife, RUTH ANN BURT, upon whose testimony the government finally came to rest its entire conspiracy case at the trial.

This was the fear of the *Britton* court; for here is what that court said:

> "To have gained some knowledge from the accused in advance of trial could have provided the prosecutor with a possible advantage to overcome the defense. . . . it cannot be said with certainty that the information volunteered by Britton to the prosecutor in his private law office did not contribute to the defendant's conviction."

The acquisition of the testimony of RUTH ANN BURT was irremediably tainted by and connected with the unlawful and proscribed meeting of the defendant

BLAIR and the justice department's Atlee Wampler. In that meeting, the issue of immunity from prosecution for the defendant BLAIR was conveniently exploited by the government, where the constitution required that the government follow the only available ethical route prior to putting its hand in the cookie jar, or honey pot.

Mr. Wampler was a member of the bar, who ignored the bar's command. It would not be amiss to refer to his actions as totally unscrupulous. He knew better than to engage in a secret parley with a defendant and his wife, without prior notification of retained counsel. It is difficult to accept the view that this inattention to professional responsibility, and omission to observe the Canons of Ethics was accidental.

Wampler was a special justice department lawyer assigned from Washington, D.C. to the Organized Crime section of the Department of Justice. He traveled from one end of the country to another. He had participated in some of the most highly publicized wire tap cases in the country. He had access to legal libraries, and aides, and assistants in his legal researches. It can only be presumed that by omitting to follow the mandate of the Canons, he could acquire a witness to assist in prosecuting the other defendants. He felt that without notice to counsel he would be able to tap a fruitful well and buttress his case on trial. He saw, RUTH ANN BURT, the common law wife of GEORGE BLAIR as a more important by-product of the meeting with the defendant BLAIR. He knew that BLAIR wanted immunity in exchange for his wife's testimony. Knowing all this in advance, he was required to notify the defendant's attorney of the possible meeting to discuss immunity. This was not done. Instead he held

the meeting, and acquired information from BLAIR and RUTH ANN BURT. He elected not to use BLAIR; possibly because he knew that on cross-examination, the circumstances of his procurement would have been revealed. He then took RUTH ANN BURT before a grand jury to testify; and, the interesting thing is that her testimony was not needed to obtain an indictment against any of the defendants, since they had all been indicted as of January 5, 1972. His purpose in taking her before the Grand Jury was to use the Grand Jury as a means of getting the information he had acquired at the Ramada Inn Meeting in the form of testimony, and under oath, so that the witness BURT, would then be unable, or unlikely, to change her mind or testimony, under fear of prosecution for perjury. The witness could not lawfully be taken before the Grand Jury to buttress *an already pending indictment.* This was a misuse of the grand jury, so wholly in character with the other acts of misconduct and over-reaching which permeate the case.

The government's action in taking RUTH ANN BURT before the Grand Jury, as a means of putting information acquired on record under oath, and as a means of procuring a witness for trial, is destructive and violative of the historical purposes of the grand jury, and of the fifth and sixth amendments as well. (Cf. pp. 1498, 1502, 1503 appendix) *United States v. Dade,* ca 2, 1964), 330 F.2d 316.

The Sixth Circuit's claim that grand jury proceedings cannot be policed in any detail, relying upon *U.S. v. Doe*, 455 F.2d 1270, 1st Cir.; and *Univ. Mftg. v. U.S.*, 508 F.2d 684, 8th Cir.; and *Beverly v. U.S.*, 468 F.2d 732, 5th Cir. (page 11a hereof) poses a conflict among the circuits which only the grant of certiorari can remove.

IV.

THE ATTORNEY GENERAL'S NON COMPLIANCE WITH HIS OWN ADMINISTRATIVE RULES IN AUTHORIZING THE FILING FOR AN INTERCEPTION ORDER RENDERED ANY INTERCEPTION ORDER SUBSEQUENTLY OBTAINED INVALID, AND REQUIRES SUPPRESSION OF ANY WIRE INTERCEPTIONS.

The Court of Appeals, on page 24 of the slip opinion, appendix hereto, without any citation of authority at all stated that Section 0.180 of 28 C.F.R. "is not applicable to delegations of the special authority over applications for interception orders, or the Attorney General's personal approval of an application for an interception order." The Court then went on to suggest that *United States v. Falcone,* 505 F.2d 478, 3rd Cir., 1974, cert. denied, 420 U.S. 955, 1975, stood for the proposition that even an oral, verbal approval by the attorney general would suffice to validate approval of an interception order.

This writer does not read *Falcone* to suggest such a notion. Falcone was a case in which John Mitchell's name had been signed by his executive secretary, Sol Lindenbaum, on his express direction; and it was one in which the Attorney General filed a supplemental memorandum to sign his name on the original memorandum of authorization.

As one reads that case it appears that the original order of authorization was facially sufficient, but that someone determined that the signature of John Mitchell had been signed by his executive secretary. The critical testimony in *Falcone* was that the Attorney General indicated he had approved the application, but had

merely authorized someone else to sign his name on the memo. That is entirely different from a situation, such as we have here, where there is no document signed by John Mitchell, and no affidavit, evidencing his approval of the application for the wiretap; and further where there was timely objection to the *manner* of approval.

Falcone doesn't deal with the Administrative Procedure Act; and neither do the cases of *U.S. v. Vigi,* 515 F.2d 290, 6th Cir.; and *U.S. v. Acon,* 513 F.2d 513; or *U.S. v. Becker,* 461 F.2d 230, in all of which cases, the approval of the Attorney General remained uncontested.

The Rule guiding the Attorney General, promulgated at 0.180, Title 28 C.F.R. plainly requires that all "documents relating to the delegation of authority, functions, or duties by the Attorney General, shall be designated as orders and issued only in a separate numbered series."

It is certainly obvious that the Attorney General's grant of authority to a United States Attorney to apply for a wire tap is a "delegation of authority," as well as a "delegation of a duty." The law says "*all documents* relating to such a delegation by the Attorney General," must be designated as an Order, and numbered.

The District Court had no basis whatever for saying, as it did on p. 675App, "The memorandum here was a designation specifically authorized under Section 2516(1), Title 18 U.S.C., and was not a delegation of authority as contemplated by Section 0.190."

The memo questioned here, on its face states that it is "in regard to your recommendation that *authority be given* to Atlee Wampler *to make application* . . . for a wire tap." That authority, now said to have been exercised by the Attorney General himself, when

implanted on any writing clearly becomes a "document," related to the assignment, by the Attorney General, of authority to an otherwise impotent person, to apply for a wire tap. Clearly this type of authorization, emanating from the only person qualified to make it, was within the intended ambit of Section 0.180, Title 28 C.F.R.

When Congress enacted the Wire tap sections of the Omnibus Crime and Safe Streets Act, it was charged with knowledge of the existence of Section 0.180, Title 28 C.F.R. Congress, itself, had previously passed Section 552(2)(i), Title 5 U.S.C., requiring all agencies, as they defined that term, to index any "order" to be "used" against any party. There is no reason whatever to believe that Congress, in enacting Section 2516(i), intended to exempt the Attorney General from the operations of Rules and Laws already on the books. If Congress had intended this result, it would have to plainly state that to be the case.

All statutory sections must be read in harmony to give full effect to all Congressional statutory expressions, as well as duly approved rules adopted in pursuance to a Congressional grant of authority.

His own adopted Rules, and those of the Federal Administative Procedure Act, limit his hand in that regard. His rules, and particularly the rule found at Section 0.180, Title 28 C.F.R. declare:

> *All documents* relating to . . . the assignment . . . or delegations of authority, functions, or duties by the Attorney General . . . shall hereafter be designated as *orders* and *shall be issued only by the Attorney General in a separate numbered series.* Classified orders shall be identified as such, included within the numbered series, and limited to the distribution provided for in the order . . .

That Rule was adopted under the Rule making limitations of Section 552(2)(i), of Title 5 U.S.C. That section mandates that before any order be "relied on, used, or cited as a precedent against any party" it be indexed and either made available to the party or published.

The Attorney General has never signed, numbered, or indexed any order with reference to either of the wire taps in the within case; and accordingly no claim can be made by the government that he ever acted in relation to either of the wire taps involved.

The settled administrative rule of law is that administrative officers must act within the limits of their own rules. Such rules are binding on a public agency as well as on those with which it deals. *N.Y. Telephone Co. v. U.S.*, 56 F. Supp. 932; *Amer. Brdcstg. Co. v. FCC*, 179 F.2d 437; *Wilson v. Watson*, 309 F. Supp. 263, affd. 422 F.2d 866.

A Rule duly adopted acquires the force and effect of statute law, and in fact, the Rule becomes an integral part of the statute under which it was adopted:

> *Sheridan-Wyoming Coal Co. v. Krug*, 172 F.2d 282
> *Paul v. U.S.*, 371 U.S. 245, 9 L.Ed.2d 292, 83 S.Ct. 426.

Under no conceivable basis therefore could the government offer, over defense objections, a memorandum containing an initial claimed to be the Attorney General's, as evidence of his act of approval of an authorization for wire taps directed against them. His act, if it occurred at all, had to be manifested in the manner prescribed by his and the federal government's rules, and in no other way. Judicial review is limited to the Agency's administrative record alone. *Hill v. Kennedy*, 310 F. Supp. 455, [illegible] see also, *Wilson v. U.S.*, 335 F.2d 788, 799.

V.

THE SIMULTANEOUS POSSESSION OF CONTROLLED SUBSTANCES IS PUNISHABLE ONLY ONCE AS A POSSESSION OF DRUGS: AND MAY NOT, BY SUBDIVISION OF A LARGE QUANTITY OF DRUGS INTO SMALLER AMOUNTS BE MADE INTO SEVERAL CRIMES FOR WHICH SEVERAL PUNISHMENTS MAY BE IMPOSED.

The government in Counts 12, 13, 14, 15 and 16 of the Indictment charged the appellants with the possession with intent to distribute, in violation of §841(a)(1), Title 21 U.S.C., of the following quantities and types of controlled substances:

Count 12–659.66 grams of cocaine
Count 13–681.8 grams of heroin
Count 14–45.3 grams of heroin
Count 15–14.66 grams of cocaine
Count 16–2589.93 grams of heroin

The proofs offered by the government established that all of the drugs represented by the charges came from the Hubbell St. address on December 15, 1971, following the arrest, in the address, of EDDIE JACKSON, COURTNEY BROWN, GEORGE BLAIR, AND JOE & REGGIE WEAVER. No testimony in the record suggests that these narcotics were seized from the immediate possession of any of these defendants. As a matter of fact, the testimony established that there were no drugs proximate to any of the defendants at the time the officers entered the premises at 9:50 P.M. to arrest JACKSON, BROWN, & BLAIR. A "cloud of dust" which the officers surmised was some form of aerated drugs was filtering out in the vicinity of the

kitchen. (p. 536) Subsequent searching of the premises, and particularly the upstairs portion thereof, disclosed the major quantity of drugs, packaged and situate in a cardboard box. (p. 542) Telephone interceptions clearly inferred, and, it was the position taken throughout by the government, that drugs, *in shipment form*, arrived at the Hubbell address on the 15th of December, 1971.

What the proofs failed altogether to establish, was the personal knowledge of any of the defendants, of the presence of such drugs on the premises. Wire interceptions of the 15th suggested only that HERBERT BELL knew the "stuff" was there, "and going fast." (Tape 83, Conversation 26, page 1324) Inferentially, it could be suggested that, if persons arrested at 9:50 P.M. were present when that call was made they would also have been aware of the presence of some type of "stuff" in the Hubbell address.

But, the government charged an awareness with specific quantities and types of drugs, without proving specific knowledge as to those quantities and types as to any one defendant. The government could not convict these defendants upon simply a showing that drugs were found on the premises, without showing scienter as to each of them. How could anyone presume that any one of the defendants was aware of the presence of drugs upstairs in the premises, in a box, in a hole in the floor and packaged, as was the testimony. (Page 606 appendix)

The statute under which the government proceeded on each of the contested counts, being §841(a)(1), Title 21 U.S.C., required that the government prove each defendant "knowingly and intentionally" possessed the quantities and types of drugs indicated in the various counts of the indictment.

Significantly, the statute does not contain any limiting language as to quantity. It refers solely to the "possession of controlled substances." Due process requires that, if the government is suggesting that the drugs seized from the Hubbell address were from different sources, so as to make tenable the separation of a single "shipment" of controlled substances into five (5) parcels of drugs, then the government's proofs were woefully inadequate to accomplish this end. For nothing in the testimony suggests anything other than a unity of origin, transportation, delivery, and concealment. The government's entire case presumed that Hubbell was a "dope pad" where "drugs" were illegally stored.

The statute under which the indictment was brought only permits a prosecution to be maintained on a single count, where the proofs clearly establish but a single act of possession of "controlled substances," all of which, as are cocaine & heroin, fall within the same class structure as outlined by the Congress.

Thus, the convictions of the defendants on counts 12 to 16 must be set aside as being fundamentally in derogation of the accused' rights to due process under the fifth amendment.

In brief summary, the government cannot stretch out a single act of possession of the same class of controlled substances, as defined by the Congress, into five separate acts of possession without proving facts on trial which form a basis for the separation and reasonably establish some reason for making out five separate acts of possession; deriving either from the diversity of source, or from distinctly separate exercises of dominion or proprietary control. That under no circumstance can the government arbitrarily subdivide a

single quantity of narcotics up into smaller portions to support as many different convictions as it wishes, whenever it wishes. That, as appellants see it, where drugs clearly arrive at a "dope pad" which is ostensibly under the controll of three or four persons, in "shipment" form, on a single date, only a single, although perhaps joint, conviction for possession with intent to distribute can be had; and then, only upon a showing that a particular defendant, or particular defendants, were knowledgeably privy to the control and concealment of the said drugs.

Certainly, persons arrested after the arrival of the drugs could not be convicted; and certainly not others having absolutely no connection with the house on December 15, 1971.

All the government has shown in its evidence, is the separation of a quantity of drugs into smaller quantities. Nothing more. This arbitrary separation is a denial of the equal protection element of due process, and cannot support the convictions of the defendants.

When various drugs are simultaneously possessed, there is but one violation of the law; and any attempt to punish an accused five times over for a single violation of the law runs smack up against the prohibition of the Fifth Amendment that no person shall be twice punished for the same offense. Cf. *United States v. Hughes,* U.S. Court of Military Appeals, 3/19/76, 19 *CrL* 2087.

In the within cause we have presented the classic situation where the Supreme Court is asked to interpret the meaning of the double jeopardy clause of the Fifth Amendment to the Constitution; and to decide, as an ultimate rule of recognition, that persons may not be subjected to multiple punishment for what is clearly but one offense. For this reason, in this case, certiorari should be granted.

VI.

THE PINKERTON RULE REVISITED REQUIRES VACATION OF THE CONVICTIONS OF THE APPELLANTS HEREIN, AND PARTICULARLY THE APPELLANT HORNE, WHOSE ONLY CONTACT WITH THE ALLEGED CONSPIRACY OCCURRED ON THE LAST DAY OF SAID CONSPIRACY AND BY PHONE CONVERSATION.

The trial court, in its formal findings, improperly applied the Rule announced in *Pinkerton v. United States*, 328 U.S. 640, 90 L.Ed. 1489, 66 S.Ct. 1180, to effect the conviction of all persons charged with conspiracy in the government's indictment, of all the substantive offenses committed by each other alleged co-conspirator.

What was announced in *Pinkerton* needs to be clearly discerned. First of all, *Pinkerton* seemed clearly to require that the overt act sought to be related to any defendant, *be charged in the conspiracy count* of the indictment. Secondly, it permitted punishment only *for those acts committed subsequent to any conspirator's joinder* therein; and finally it required and suggested that the act be such as would reasonably be anticipated to further the objectives of the total conspiracy.

On page 642 of 328 U.S., the Court pointed out that, there "a single conspiracy was both *charged and proved*, and some of the *overt acts charged in the conspiracy count* were the same acts *charged in the substantive counts.*"

A careful look at the conspiracy counts of the indictments in both cases, here establishes that the

government failed to allege therein the commission of any of the substantive counts set forth elsewhere in the indictments.

That procedural omission prevents the application of the *Pinkerton* rule, and the punishment of the defendants for the various offenses committed by others, to which they were not privy. Procedural due process requires *notice*, and that thought permeates *Pinkerton*, where the defendant on trial was fully informed of the fact that in defense of the conspiracy count he was going to be expected to defend against the precise substantive offense with which he was also charged. Defendants can't be held to respond to claims the government never made in its indictment.

In *Pinkerton*, the conspiracy and the substantive offenses were announced to be separate and distinct. (328 U.S., p. 643) Notice and opportunity to be heard are essentials of due process. Each defendant was required to be notified as to what he was expected to defend against. The mere presence of allegations in other distinct, and separate, counts of the indictment as to several individual defendants, cannot suffice to shore up the patent defect in the conspiracy count of the indictment, or to notify each individual defendant of the fact that he was to concern himself with defending as to his own relationship, if any, to the substantive offenses charged.

In similar vein, *Pinkerton* clearly, at p. 645 of 328 U.S., made "time of joinder," and "scope of the activity," relate to the issue of vicarious responsibility for other defendants' misdeeds.

There the court made clear that finding of guilt is only possible:

> "If it was found *at the time those offenses were committed petitioners were parties to an unlawful*

conspiracy and the substantive offenses were committed in furtherance of it."

Thus, under *Pinkerton,* a person cannot be found guilty of offenses committed prior to his joinder in a conspiracy, and by other persons who might have entered such criminal combination prior to his association therewith.

Thus, take a car-theft conspiracy for example—A fence of stolen cars in Memphis, Tennessee, could not be vicariously made responsible for a murder committed in the theft of a car in Detroit, prior to his association with the thieves.

Nor, could every driver of stolen cars be made responsible for substantive thefts of cars *which occurred prior to his association with the car theft ring,* since those substantive acts of thievery could in no way be ipso facto related to any joint interest of the driver at the time of their commission. Joint interest in a common venture, in and of itself limits the application of *Pinkerton.* One could hardly be viewed as having constituted a person as his agent, where there is no basis for presuming the existence of an implied or express agency relationship. Nor could, for example, a driver be viewed as constituting a "murderer" as his agent where he joins a car theft ring. This act is simply beyond the purvue of the venture he embarked upon. Thus, where the government's proofs could only establish a defendant's *connection* with a conspiracy by a single act of possession of a quantity of narcotics on December 15, 1971, such defendant could neither be made a co-conspirator to the on-going narcotics conspiracy, nor charged with every and any substantive offenses committed prior to such connection therewith. And, where the trial court blanketly convicted all of

the defendants for the substantive offenses committed by others, on the ground of *Pinkerton,* and without regard to the time such person touched base with the alleged conspiracy, such convictions are invalid, and must be set aside.

In light of the fact that the within case has been passed on by five judges, who do not read Pinkerton in the manner briefed above, it seems that there exists a great deal of confusion which ought to be erased. In view also of the fact that three Appellate Court judges construe the case to authorize the conviction of all conspirators for others' crimes, the entire matter should be reconsidered by the Supreme Court, and over-ruled, and certiorari should be granted to accomplish that end.

CONCLUSION

For the foregoing reasons, the indictment against the petitioners should be dismissed, and their convictions reversed, or other appropriate relief granted them.

Respectfully submitted,

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APPENDIX

CONTENTS OF APPENDIX

APPENDIX

Nos. 74-2337-53

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARA WOODS, JR., WILLIE LEE KILPATRICK, JOSEPH LEON WEAVER, JAMES REGINALD WEAVER, EDDIE JACKSON, COURTNEY BROWN, HERBERT BELL, RONALD GARRETT, SAMUEL HORNE, ALPHONZO JONES, FAIRH LEE RIGGS, CHARLES RUDOLPH, LATICIA BURNS, MAURICE THOMPSON, LEO HURT, GEORGE BLAIR, CHARLES CAVANAUGH,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed October 8, 1976.

Before: CELEBREZZE, McCREE, and MILLER,* Circuit Judges.

McCREE, Circuit Judge. We have consolidated for consideration the appeals of seventeen defendants from their convictions in the Eastern District of Michigan. Each appellant had been charged in one of two similarly worded indictments

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* The Honorable William E. Miller died on April 12, 1976 and did not participate in this opinion.

with sixteen violations of federal narcotics laws, 21 U.S.C. §§ 841 and 846. One indictment, hereinafter the Jackson indictment, named fifteen unindicted co-conspirators and seventeen defendants, including appellants Eddie Jackson, Herbert Bell, Ronald Garrett, Samuel Horne, Alphonzo Jones, Fairh Lee Riggs, Charles Rudolph, Charles Cavanaugh, Laticia Burns, Maurice Thompson, Leo Hurt, George Blair, and Courtney Brown. The other indictment, hereinafter the Kilpatrick indictment, named as defendants the fifteen persons who were unindicted co-conspirators in the earlier indictment, including appellants Willie Kilpatrick, Joseph Weaver, James Weaver, and Cara Woods. The persons named as defendants in the first indictment were named as unindicted co-conspirators in the second indictment. Count 1 of both indictments charged a single conspiracy that continued from September to December 1971 to manufacture, distribute, and possess heroin and cocaine in violation of 21 U.S.C. § 846. Counts 2 through 16 charged substantive violations of 21 U.S.C. § 841 committed during the period from October to December 1971.

One of these cases was assigned to District Judge John Feikens for trial, and the other to District Judge Philip Pratt, both of whom are Judges of the Eastern District of Michigan. Consolidated pretrial evidentiary hearings were held to consider various motions raised by appellants. In addition to waiving their right to trial by jury, the various defendants also agreed to proceed with a simultaneous bench trial before Judges Feikens and Pratt in order to avoid the necessity of two separate trials involving identical proofs.

Although the proceedings in the two separate cases were conducted simultaneously, each judge was solely responsible for all rulings affecting each defendant in the case assigned to him, and each judge entered separate findings and conclusions regarding the guilt or innocence of each defendant in the case assigned to him.

At the conclusion of their joint bench trial, all appellants were found guilty on multiple counts and received sentences

ranging from three years' imprisonment to twenty years' imprisonment.[1] Appellants Kilpatrick, James Weaver, Joseph Weaver, Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh, and Hurt were convicted on counts 1, 3, 4, and 6 through 16. Cara Woods was convicted on counts 8 and 9. And appellants Burns and Thompson were convicted on counts 2 and 5.

The simultaneous trial conducted in the district court was an understandable effort to accommodate indictments of the magnitude and complexity that were obtained here by the government. Nevertheless, this procedure has produced an appellate record of extraordinary size with the consequence that oral argument has been of less than usual assistance to us in analyzing and deciding the issues presented on appeal.

Instead of beginning our opinion with a narration of the facts, we shall consider the facts giving rise to each separate appellate issue in our discussion of it.

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[1] The following appellants were convicted and sentenced by Judge Pratt: Willie Lee Kilpatrick was convicted on counts 1, 3, 4, 6 through 16, and sentenced to concurrent terms of six years' imprisonment on each count, subject to the parole provisions of 18 U.S.C. § 4208(a)(2), with a special parole term of three years. In addition, the court imposed a $2,000 committed fine on count 1. James Reginald Weaver and Joseph Leon Weaver were convicted on counts 1, 3, 4, 6 through 16, and sentenced to concurrent terms of four years' imprisonment on each count, subject to the parole provisions of 18 U.S.C. § 4208(a)(2), with a special parole term of three years. Cara Woods, Jr. was convicted on counts 8 and 9, and sentenced to concurrent terms of six years' imprisonment on each count under the parole provisions of 18 U.S.C. § 4208(a)(2), with a special parole term of three years. The court also imposed a $1,000 committed fine on each count.

The remaining appellants were convicted and sentenced by Judge Feikens. Appellants Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh, and Hurt were convicted on counts 1, 3, 4, 6 through 16, and received the following sentences. Eddie Jackson was sentenced to concurrent fifteen-year terms of imprisonment on counts 1, 3, 4, 6, 7, 8, 9, 10, 11, and 12, to be served consecutively with concurrent five-year terms of imprisonment imposed on each of counts 13 through 16, and a special three-year parole term. A committed fine of $5,000 on each count was also imposed. George Blair and Courtney Brown were sentenced to concurrent terms of fifteen years' imprisonment on each of counts 1, 3, 4, 6, 7, 8, 9, 10, 11, and 12, to be served consecutively with concurrent terms of 2½ years' imprisonment on each of counts 13 through 16, with a special three-year term of parole, and a committed fine of $5,000 on each

I. WERE DEFENDANTS PROPERLY INDICTED?

Appellants[2] challenge the validity of the indictments on several grounds. First, they contend that the grand jury was improperly selected. Second, they contend that the information intercepted by the wiretaps was placed before the grand jury before the government complied with 18 U.S.C. § 2518 (10)(a). Third, they argue that the government misused the grand jury to intimidate persons whom the government intended to call later as witnesses in appellants' criminal trials. Finally, appellants urge that the indictments were multiplicitous.

A. The Selection of the Grand Jury.

Appellants argue that the selection of the grand jury venire violated the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, as well as the selection plan adopted in the

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count. Ronald Garrett received concurrent terms of 12½ years' imprisonment on each count, with a special parole term of three years and a committed fine of $3,000 on each count. Charles Rudolph and Herbert Bell received concurrent terms of ten years' imprisonment on each count, with a special parole term of three years, and a committed fine of $1,000 on each count. Samuel Eugene Horne, Alphonzo Jones, Charles Cavanaugh, and Leo Hurt were given concurrent terms of seven years' imprisonment on each count, with a special parole term of three years, and committed fines of $1,000 on each count. Fairh Lee Riggs was sentenced to concurrent terms of seven years' imprisonment on each count, with a special parole term of three years, both to be served concurrently with a sentence imposed by the district court for the Eastern District of New York, which Riggs was then serving.

Appellants Thompson and Burns were convicted on counts 2 and 5, and were sentenced as follows: Maurice Thompson received concurrent terms of five years' imprisonment on each count, with a special parole term of three years' imprisonment to be served at a federal facility with a drug abuse program. Laticia Burns received concurrent terms of three years' imprisonment on each count to be served at a federal facility having a drug abuse program, to be followed by a special three-year parole term.

[2] A number of separate briefs were filed on appeal. Unless otherwise noted, we will treat each argument as applicable to all appellants.

Eastern District of Michigan because an improper voting list was used, an unauthorized person took part in the compilation of the master jury wheel, and a jury clerk took official work out of the office to her home.

We decided these identical issues in *United States* v. *McNeal*, 490 F.2d 206 (6th Cir. 1973), *cert. denied*, 419 U.S. 1020 (1974). At the district court level, the parties in *McNeal* stipulated that precisely the same challenges to the grand jury venire had already been submitted to Judge Feikens and to Judge Pratt in the Kilpatrick and Jackson cases. The parties in *McNeal* agreed to be bound at the district court level by the rulings of Judge Pratt and Judge Feikens, and in accordance with their rulings, the district court denied the motion to quash the indictment in *McNeal*. On review we held that "there was no 'substantial failure to comply with the provisions' of the Act." 490 F.2d 207. We hold that our determination in *McNeal* is dispositive of these appeals as well, since not only the same issues but also the same facts giving rise to them are before us again.

B. The Presentation of Wire Interception Evidence Before the Grand Jury.

Immediately after their arrest, several appellants filed a motion to suppress the wiretap evidence that they believed might have formed a basis for their arrests. They also sought disclosure of the applications and orders for the interceptions. In addition, they moved to enjoin the government from holding a preliminary hearing or presenting the wiretap evidence to a grand jury until ten days after obtaining the disclosure they sought. The government opposed the motions, but neither admitted nor denied the legality of the wire interceptions. After hearing oral arguments, the district court held that the government could not present wire interception evidence at a preliminary hearing without disclosure, but otherwise the district court denied the motions.

On the day scheduled for the preliminary hearing, appellants were indicted by the grand jury, which heard the testimony of Special Agent Garibotto and evidence from the wire interceptions. The return of the indictments made it unnecessary to conduct the preliminary hearing.

Appellants contend that this procedure violated 18 U.S.C. § 2518(9) and (10)(a) and 18 U.S.C. § 3504. Section 2518 (9) provides that:

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

Section 2518(10)(a) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Finally, § 3504 states:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act . . . .

Appellants contend that these sections authorized their motions to suppress, required the government to affirm or deny the legality of the wire interceptions, and prohibited the government from relying on the evidence gathered as a result of the interceptions until these requirements were satisfied. Accordingly, they contend that their indictments must be quashed because the government presented this evidence to the grand jury before it replied to their challenge to the interceptions. 18 U.S.C. § 2515 provides that no intercepted wire communication or evidence derived therefrom may be "received into evidence . . . in any . . . proceeding or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter."

We hold that the government was not required to comply with § 2518(9) or to affirm or deny the illegality of the interception before it could introduce the intercepted communications before the grand jury, nor were appellants entitled to prevent the presentation of this evidence to the grand jury even if the interception were unlawful.

The legislative history of § 2518(9) demonstrates that Congress did not intend the ten-day disclosure requirement to apply to grand jury proceedings. The Senate Report section-by-section analysis provides that:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation

> revocation proceeding, or a hearing on a motion for reduction of sentence. *It would not include a grand jury hearing.* Compare *Blue* v. *United States*, 86 S. Ct. 1416, 384 U.S. 251 (1966).

U.S. Code Cong. & Admin. News 2195 (1968).

The Congressional history of § 2518(10)(a) demonstrates that this section was not intended to permit a defendant to challenge the evidence presented to the grand jury:

> Paragraph (10)(a) . . . . must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. *Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual.* (*Blue* v. *United States*, 86 S.Ct. 1416, 384 U.S. 251 [1963].) *There is no intent to change this general rule.* It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

U.S. Code Cong. & Admin. News 2195 (1968). [Emphasis added.]

The Supreme Court's opinion in *Gelbard* v. *United States*, 408 U.S. 41 (1972) analyzes §§ 2518(10)(a) and 3504, and supports the conclusion that they do not authorize a defendant to suppress evidence before the grand jury on the grounds that it was intercepted illegally. Nor is the government required to affirm or deny the legality of the interception. In *Gelbard* the Court held that a grand jury witness could refuse to answer questions that were based upon illegal interceptions, and could defend against a contempt charge under 18 U.S.C. § 2515. Section 2515 bars the use as evidence before official bodies of the contents and the fruits of

illegal interceptions. The Court held that in the context of § 3504, which states the procedures by which aggrieved persons may challenge illegally procured evidence, a "party aggrieved"

> *can only be a witness,* for there is no other "party" to a grand jury proceeding. Moreover, a "claim . . . that evidence is inadmissible" can only be a claim that the witness' potential testimony is inadmissible.

408 U.S. 54. [Emphasis added.]

The Supreme Court drew a careful distinction between a *witness* before the grand jury, who it held may refuse to answer questions based upon illegal interceptions, and a defendant or potential defendant. The Court held that:

> The congressional concern with the applicability of § 2518(10)(a) in grand jury proceedings, so far as it is discernible from the Senate report, was apparently that defendants and potential defendants might be able to utilize suppression motions to impede the issuance of indictments: "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v. *Blue*, 384 U. S. 251 (1966).] There is no intent to change this general rule." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). The "general rule," as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence in violation of the [law]," even if the "tainted evidence was presented to the grand jury." 384 U. S., at 255 and n. 3; see *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1956). But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt.

408 U.S. 59-60.

Accordingly, we hold that appellants were not entitled to contest the legality of the intercepted communications before the communications were submitted to the grand jury. Appellants contend, however, that they had a right to contest the admissibility of wiretap evidence at the scheduled preliminary hearing, and that the government could not deprive them of this right by the sudden tactic of obtaining an indictment.

Our court has repeatedly held that if "a grand jury returns a true bill prior to the time a preliminary hearing is held, the whole purpose and justification of the preliminary hearing has been satisfied." *United States* v. *Mulligan*, 520 F.2d 1327, 1329 (6th Cir. 1975). A defendant has no right to have a preliminary hearing if a grand jury indictment is returned. Although we have recognized that a preliminary hearing may as a practical matter provide a defendant with an irreplaceable opportunity for discovery, a defendant has no absolute right to these ancillary benefits. For example, in *Mulligan* we held that defendants, who wanted to cross-examine a key government witness prior to trial, suffered no prejudice when their preliminary hearing was continued to permit the government to obtain a grand jury indictment in the interim. Accordingly, we hold that appellants suffered no *legal* prejudice when the government proceeded by indictment, rather than by a preliminary hearing at which appellants could have contested the legality of the wire interceptions pursuant to 18 U.S.C. §§ 2518(10)(a) and 3504.

C. Improper Use of the Grand Jury.

Appellants also assert that the government improperly used the grand jury to discover and preserve evidence to be used at the trial of their already pending indictments. They assert that both Burt and Nabors were called before the grand jury to testify against appellants *after* appellants' indictment. The government concedes that it is improper to use a grand jury solely to prepare a pending indictment for trial. *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972); 8 Moore's Federal Practice ¶ 6.04. But it contends that the record contains no support for appellants' claim that Burt and Nabors were called only to prepare pending indictments for trial. Additionally, the government urges that appellants have not demonstrated that any prejudice resulted from the alleged misconduct, and it contends that only Nabors and Burt have standing to raise the issue.

A presumption of regularity attaches to a grand jury's proceedings and appellants have the burden of demonstrating that an irregularity occurred. *Universal Manufacturing Co.* v. *United States*, 508 F.2d 684 (8th Cir. 1975); *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972). Moreover, we agree with the observation made by the First Circuit that:

> grand jury proceedings cannot be policed in any detail. It is a price we pay for grand jury independence that sometimes people are indicted on the basis of evidence tainted in part by hearsay, Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), or of illegally obtained evidence, Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). Nor is a grand jury narrowly confined in its objectives, Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

United States v. *Doe*, 455 F.2d 1270, 1274 (1st Cir. 1972).[3] Accordingly, in *United States* v. *George*, 444 F.2d 310, 314

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[3] The court also recognized, however:

> On the other hand, we are sensitive to the possibilities of abuse of the grand jury process which are inherent in the present situation. As Moore has observed, "The government has at its disposal one of the most effective discovery mechanisms yet devised—the grand jury. This body may call witnesses under compulsory process and examine them in secret under oath, unhampered by the rules of evidence or an adversary counsel's cross-examination, or in the case of a 'prospective defendant' by Fifth Amendment immunity. [citations omitted]." 8 Moore's Federal Practice ¶ 16.08[1], at 16-100 (2d ed. 1970). 455 F.2d at 1275.

(6th Cir. 1971) we held that "[s]o long as it is not the sole or dominant purpose of the grand jury to discover facts relating to [a defendant's] pending indictment, the Court may not interfere with the grand jury's investigation."

Neither appellants nor the government have cited to us any portion of the record in which appellants presented this claim to the district court, and we have searched the voluminous record to no avail. However, assuming that this issue is properly before us, we hold that appellants have presented nothing beyond their own unproved suspicions to prove that Burt and Nabors were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictments for trial. Portions of the testimony at trial suggest that after appellants were indicted, Burt and Nabors did testify before the grand jury regarding some of the matters at issue in appellants' trial. However, appellants have made no showing that Burt and Nabors were not called in order to determine whether other persons not yet indicted were also involved in the conspiracy under investigation. The indictments charged that appellants conspired with "divers other persons whose names are to the Grand Jury unknown," and the grand jury could properly call witnesses in an attempt to identify these persons. *United States* v. *Beverly, supra.*

D. Multiplicity.

Appellants allege that they were improperly indicted and convicted of five separate acts of possession with intent to distribute a controlled substance,[4] when the proofs showed

[4] The counts charged:
Count 12 — 659.66 grams of cocaine hydrochloride, with a strength of 15.8%.
Count 13 — 681.80 grams of heroin hydrochloride with a strength of 19.3%.
Count 14 — 45.30 grams of cocaine hydrochloride with a strength of 5.1%.
Count 15 — 14.66 grams of cocaine hydrochloride with a strength of 32.7%.
Count 16 — 2,589.93 grams of heroin hydrochloride with a strength of 58.1%.

that all the narcotics in question were found at the Hubbell Street house, and that the intercepted wire communications indicated that appellants had just received a *single* shipment. Accordingly, appellants contend that the fragmentation into multiple counts of a single act of possession of narcotics violated their right to due process.

Apparently appellants raise this contention for the first time on appeal. The government contends that under F. R. Crim.P. 12(b)(2) appellants' failure to make the claim that the indictment was multiplicitous by pretrial motion constituted a waiver of this objection. F.R.Crim.P. 12(b)(2) requires that "[d]efenses and objections based on defects . . . in the indictment or information" "*must* be raised" prior to trial. (Emphasis added.) However, F.R.Crim.P. 12(f) also provides that the "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, *but the court for cause shown may grant relief from the waiver.*" (Emphasis added.)

Since it is not entirely clear from the general averments in the indictments that the narcotics referred to in counts 12 through 16 were all seized from the Hubbell Street house, there may have been good cause for appellants' failure to have raised this issue before the district court until the government presented its case. However, since appellants failed to present this objection to the district court even after the close of the government's case, when the factual basis of their objection was apparent, we hold that they waived this objection under F.R. Crim. P. 12(f).

Appellants also argue that counts 6 and 10 and counts 7 and 11 are multiplicitous, because they charge both distribution and possession with intent to distribute the same quantities of drugs. They urge that possession with intent to distribute is a lesser offense included within distribution. Again, it appears that appellants did not raise this contention before the trial court, and we hold, accordingly, that it was waived F.R. Crim. P. 12(f).

II. WAS THERE GOVERNMENT MISCONDUCT THAT REQUIRES REVERSAL?

Appellants contend that shocking governmental misconduct requires the reversal of their convictions. They contend first that a sham defendant was indicted in order to penetrate their defense. Second, they argue that before their trial, the government improperly disclosed critical information to the press. Third, they complain that the government improperly intruded into the marital relationship of appellant Blair and Ruth Ann Burt, to induce her to testify against appellants. Finally, they argue that the government improperly met with Burt and Blair without any notice to Blair's attorney.

A. The Sham Defendant.

Appellants contend that the government's misconduct in indicting Roosevelt Nabors as a "sham defendant" requires the reversal of their convictions. They contend that the sham nature of the indictment of Nabors, who served as a government informer, is shown by the fact that payments to him continued even after the indictment. Further, he was called to testify before the grand jury about the case in which he was charged after he had been indicted, and defense counsel Milton Henry, who had filed an appearance on behalf of Nabors as well as most of the other defendants, was not notified. Appellants argue that the sham indictment of Nabors violated the fundamental fairness guaranteed by the due process clause, and violated their right to counsel by introducing a government agent into the defense.

Nabors testified that when he first began working with the Bureau of Narcotics and Dangerous Drugs, (BNDD), he was told that his cooperation would be communicated to the court in connection with charges pending against him for attempted murder and the unlawful driving away of an automobile. He also stated that no other promises had been made to him. He stated that while he was working with the BNDD he was

paid approximately $1,500 for living expenses. He testified that he was expected to help to set up arrangements so that government special agents could make purchases directly from members of the Jackson organization. He was not authorized by them to make purchases on his own. Nevertheless, he testified that without the knowledge or authorization of the government, he sold $600 worth of heroin that he had received from the Jackson organization on consignment. He said that when he was arrested, he was told that he was being prosecuted because of this independent transaction.

Agent Garibotto testified that during a review of tape recordings of the intercepted communications after the December 15 arrests at Hubbell Street, government agents discovered that, without government authority, Nabors had called and arranged to pick up at least one quantity of heroin, and that he had sold it. Garibotto testified that Nabors was indicted in good faith for this unauthorized part in the conspiracy. Although he had been severed from the other defendants before trial, Garibotto testified that the government retained the right to try him separately, and that at the time of the trial of the other defendants, no final decision had been made whether he would be brought to trial or not. He said that he planned to make no recommendations one way or the other. He stated that he had authorized a payment to Nabors after his testimony before the grand jury so that Nabors could stay out of sight in a motel. He said that after the indictment he had not used Nabors again as an informant, but he believed that others in the BNDD might have done so.

Although appellants claim that Nabors was indicted in order to penetrate the defense and learn its tactics, they have presented little evidence that Nabors was involved in appellants' common defense. Although Attorney Milton Henry filed an appearance on behalf of Nabors as he did for all the other defendants, the court's records demonstrate that counsel was also assigned for Nabors on January 25, before he was called before the grand jury. Moreover, on the government's motion,

Nabors' trial was severed from that of the other defendants on the ground that the government expected to call him as a witness. Nabors testified that when he was arrested, he did *not* meet all of the other defendants, talk to them, or know their names. He did recall that he spoke briefly to only one of the appellants, Kilpatrick.

We do not think that the record shows any government misconduct. Appellants have not sustained their burden of showing that Nabors, who was severed for trial, and for whom the district court appointed separate counsel shortly after his arrest, actually intruded into the attorney-client relationship between appellants and their counsel.

B. Pretrial Publicity Resulting from Governmental Disclosures.

Appellants make two contentions about pretrial publicity. First, they contend that the government improperly disclosed to the press information gathered by wire interceptions. Second, they contend that the volume of pretrial publicity made it impossible for them to receive a fair trial.

1. Pretrial Disclosure of Intercepted Communications.

Appellants strenuously contended both in the district court and in briefs and argument on appeal that the government made improper pretrial disclosures of critical information to the press. They urge that pretrial newspaper articles contained "detailed recitals of wire interceptions, which could only have been furnished by the government." The newspaper article principally relied upon to support this contention indicates on its face that its source was a "26-page affidavit [by] an agent of the Federal Bureau of Narcotics and Dangerous Drugs." Moreover, in their amended motion to dismiss for prosecutorial misconduct, appellants specifically argued that it was improper for the government to use information from wire interceptions in an affidavit for a search warrant,

and "then place that affidavit in the custody of a court clerk, without first making provision for its protection from disclosure as required by the plain mandate of the Federal Law."

Thus we understand the gist of appellants' argument to be that the government had a duty to prevent unauthorized disclosures of their intercepted communications, and that the government's failure to prevent disclosure of the information recited in the affidavit requires the dismissal of the charges against them. Appellants rely upon 18 U.S.C. § 2517, which lists situations in which "[a]ny investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication" may disclose or use the information. Subsection (1) permits disclosure to another investigative or law enforcement officer to the extent necessary for the performance of both officers' official duties. Subsection (2) provides generally that intercepted information and communications may be disclosed "to the extent . . . appropriate" to the officer's official duties. And subsection (3) permits disclosure where the officer is giving testimony under oath in a state or federal criminal or grand jury proceeding.[5]

Appellants contend that any disclosure not explicitly authorized by § 2517 is illegal, and they argue that § 2517 did not authorize either investigative or court personnel to disclose the contents of their intercepted communications to the press. Accordingly, they urge that the disclosure to the newspapers was illegal and that the only appropriate remedy is the dismissal of the indictments.

The government argues that subsection (2) authorized government agents to disclose the contents of intercepted com-

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[5] Subsection (5) provides:

> Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

munications in an affidavit for a search warrant. Then F.R. Crim. P. 41(g) required the magistrate before whom the warrant was returned to file the warrant "and all other papers in connection therewith" with the clerk of the district court, where they became a matter of public record. The government argues that dismissal of the charges against appellants is not warranted merely because of the government's failure to take extraordinary measures to seek restriction of access to the court files, especially when appellants made no request for such a restriction of access. The government notes that the wiretap statutes provide three remedies — suppression,[6] civil damages,[7] and criminal penalties.[8] The remedies for unlawful *disclosure* of intercepted communications are civil damages and criminal penalties. The detailed provisions of the Act contain no provision for the dismissal of pending criminal charges.

We agree with the government that appellants have failed to demonstrate any circumstances that warrant dismissal of the charges against them. However, in view of the congressional intention to protect individual privacy, it would be better practice for the government to request, as a matter of course, that the district court restrict access to documents filed with the court that contain intercepted communications.

2. Pretrial Publicity and the Right to a Fair Trial.

Appellants also contend that the pretrial publicity about their cases was so pervasive and inflammatory that they could not receive a fair trial. However, appellants were tried not by a jury, but by experienced district judges. In these circumstances appellants must show that the pretrial publicity resulted in some actual prejudice, and they have failed to do

[6] 18 U.S.C. § 2515.

[7] 18 U.S.C. § 2520

[8] 18 U.S.C. § 2511

so. Moreover, if appellants believed that one or both of the district judges could not try them impartially, the remedy was to seek disqualification. 28 U.S.C. § 144.

C. Interference with George Blair's Marriage to Ruth Ann Burt.

Appellant George Blair contends that in violation of the public policy that protects marriage, government agents intentionally broke up his marriage with Ruth Ann Burt in order to procure her testimony as a government witness. He contends that the convictions of all the appellants rest in large part on Burt's tainted testimony, and should be reversed.

Blair first presented this objection to the district court in a post-trial affidavit in support of his motion for a new trial. Blair did not testify at trial, nor did he present any witnesses who testified that the government "alienated" his marriage to Burt. The district court held that:

> there was no credible evidence indicating any improper conduct on the part of the government; rather the credible evidence, including testimony of defendant's former wife, Ruth Ann Burt, indicated the government did not act improperly.

We hold that the record adequately supports the trial court's finding, which is not clearly erroneous.

D. The Government's Meeting with Blair and Burt.

Both before the district court and on appeal, appellants argue that the government improperly met with appellant George Blair and his then wife Ruth Ann Burt without the presence of, or even notification to, Blair's attorney. Appellants urge that the meeting in the absence of counsel was fundamentally unfair. Moreover, since this was a complex conspiracy case, and Blair's statements could be used to in-

criminate other defendants found to be co-conspirators, appellants argue that the meeting violated the right to counsel of all of the appellants. In support of their contentions appellants cite *State* v. *Britton*, 203 S.E.2d 462 (W. Va. 1974) as authority for reversing a conviction when the prosecution met with a defendant in the absence of his attorney. They contend that the circumstances of the secret meeting with Blair and Burt "irremediably tainted" her testimony.

According to Burt's testimony,[9] about five months after Blair's arrest, when she and Blair were not living together, Agent Garibotto communicated with her about testifying before the grand jury, and she said that she would think about it. Later she called Garibotto and arranged to meet him, telling him that she would bring Blair. When they met, she said that she wanted to negotiate immunity for Blair, and Garibotto replied that he would have to consult the government attorney handling the case. The critical meeting was held at the Ramada Inn. Blair, Burt, Garibotto, and government attorney Wampler were all present. Burt stated that no one took notes, and she did not believe that the conversation was recorded. She did not recall whether anyone gave Blair the *Miranda* warnings. In Blair's presence she told the government agents a good deal about her knowledge of the narcotics organization and Blair's activities. When she was asked if Blair took part in the conversation, she said, "in some areas, yes." She stated that he answered some questions. Burt said that she then asked if Blair could be given immunity in return for her testimony, but that they were told that Blair would not be given immunity unless he testified himself.

At the time of the meeting, Blair and virtually all of those indicted were being represented by one attorney, Milton Henry. The government did not inform Henry of the meeting, nor was Blair asked to contact Henry himself.

[9] Blair did not testify at the trial.

The district court conducted an inquiry into this matter at a post-trial hearing. Government attorney Wampler testified that he had believed that it was Blair's wish that neither his co-defendants nor their common counsel learn of his efforts to obtain immunity in return for Burt's testimony. Moreover, he stated that Blair said little at the meeting, and that the government "didn't rely on anything that was said at the meeting and that's very true."

The trial court held that the government "offered no evidence at trial resulting from any statements made by Miss Burt or defendant Blair at the meeting . . . . [C]learly the testimony of Miss Burt at trial was in no way the fruit of the Ramada Inn discussion." The court recognized the dangers of meeting with a defendant without his counsel, especially when co-defendants are represented by the same counsel, but it held that in this case the contact with Blair was not "improper." The meeting was sought by Burt and not by the government, and it was arranged with Burt, not Blair, who made only "gratuitous" comments that were not used at trial.

We agree with the district court. We are satisfied with the district court's careful inquiry to determine whether any evidence derived from the meeting was used by the government, and with its conclusion that no evidence presented at trial was gained from the meeting. Accordingly, any error committed by the government was harmless whether measured by the ordinary or by the constitutional standard.

Of course, as a general matter, an attorney should not communicate directly with a party whom he knows to be represented by an attorney without the consent of the lawyer. *See* American Bar Association Code of Professional Responsibility, Canon 7, D.R. 7-104(a)(1). Here, however, the meeting was arranged primarily between government agents and Burt, who was not under indictment. The government did not seek the meeting. *Arrington* v. *Maxwell*, 409 F.2d 849 (6th Cir. 1969). Government attorney Wampler testified that he believed that Blair particularly wanted to keep his attempts to

secure immunity from the other defendants and the counsel who represented them all jointly. *Cf. Arrington, supra.* However, the government did not take the precautions that were possible. It did not encourage or even suggest to Blair that he should either notify Henry or arrange for the appointment of independent counsel who could be present. Although we disapprove of this practice, it bears little resemblance to the outrageous prosecutorial conduct which required reversal in cases cited by appellants. *E.g., United States* v. *Rispo*, 460 F. 2d 965 (3rd Cir. 1972).

III. DID THE DISTRICT COURT ERR IN ADMITTING CHALLENGED EVIDENCE?

Appellants also seek to overturn their convictions on the basis of several rulings by the district court admitting challenged evidence. They contend that the wiretap evidence that figured so prominently in the prosecution's case was inadmissible, first because the government's application was not properly authorized, and also because the application did not meet several statutory requirements. Appellants seek the suppression of the evidence seized at the Hubbell Street house, and from appellants Jones, Hurt, and Woods at the time of their arrests, on Fourth Amendment grounds. Appellants contend that voice exemplars that they were required to give were inadmissible on both Fourth and Fifth Amendment grounds. And finally, they contend that the testimony of Agent Garibotto identifying the voices on the tapes was inadmissible because it was the fruit of informal "aural showups" which violated appellants' Fourth, Fifth, and Sixth Amendment rights.

A. Wiretap Evidence.

The intercepted communications were critical items of proof in the government's case, and appellants contend that the district court erred in refusing to suppress the evidence seized by

the interception. They challenge the validity of the authorization for the government's application for a wiretap order.[10] They also argue that the application did not demonstrate that normal investigative procedures would have been inadequate, nor did it afford the district judge probable cause to believe that the telephone to be tapped was being used or was about to be used for one of the offenses specified in the wiretap statute.

1. The Authorization for the Application for the Wiretap Order.

Appellants argue that the wiretap evidence should have been suppressed because the government's application for the interception order lacked the authorization required by the statute. 18 U.S.C. § 2516(1) provides that:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications. . . .

In this case, the written application and the application for an extension stated that Attorney General Mitchell had specially designated *Acting* Assistant Attorney General Henry Peterson to authorize the application to the federal court, and Peterson's letter was attached.

After their indictment, appellants moved to suppress the wiretap evidence on the ground that an *acting* assistant attorney general had no authority to authorize wiretaps pursuant to § 2516. Appellants argue that the applications were insufficient on their face. Section 2518(10)(ii) provides that the contents of intercepted communications may be suppressed

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[10] Appellants' challenge applies both to the original application and to the application for the extension. Our discussion applies to both as well.

on the ground that "the order of authorization or approval under which it was intercepted is insufficient on its face."

In *United States* v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 432 U.S. 912 (1975), our court considered this argument and held that it was unnecessary to determine whether an *acting* assistant attorney general who signed the letter authorizing the application could give effective approval under § 2516, because the Attorney General himself had actually approved the application. *Accord, United States* v. *Swann*, 526 F.2d 147 (9th Cir. 1975); *United States* v. *Acon*, 513 F.2d 513 (3d Cir. 1975); *United States* v. *Robertson*, 504 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). The same situation is present in this case. The district court found that Peterson had submitted the papers supporting the request for authorization to Attorney General Mitchell, and that Mitchell himself approved the application. The government submitted the affidavit of Sol Lindenbaum who stated that the Attorney General had approved the request for authorization to apply for wiretap orders. Attached to this affidavit were copies of a memorandum from Mitchell to Peterson. In his deposition Lindenbaum identified the handwritten initials on the memos as Mitchell's. Judge Kennedy, who issued the wiretap orders, was told that Mitchell had approved the application. Appellants also contend, however, that Attorney General Mitchell's internal memoranda were ineffective because 28 C.F.R. § 0.180 required the designation of formal orders. Appellants contend that this section is applicable by its own terms to all documents relating to "the assignment . . . or delegations of authority, functions, or duties by the Attorney General." These documents are to be designated as formal "orders" to be issued by the Attorney General in a numbered series. This section is not applicable to delegations of the special authority over applications for interception orders, or to the Attorney General's personal approval of an application for an interception order. Other courts have found even verbal approval by the Attorney General to be

sufficient. *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

Appellants also contend that the affidavit in support of the application for the wiretap failed to make the averments required by 18 U.S.C. § 2518(1)(c). Section 2518(1)(c) requires that an application for an electronic surveillance order contain a "complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous. . . ." We hold that the affidavit of Agent Garibotto was a satisfactory statement of the investigative steps taken to date, and that it affords a sufficient reason why normal investigative procedures "appear to be unlikely to succeed."[11]

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[11] Agent Garibotto's affidavit stated in part:

> 19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie JACKSON and George BLAIR relating to their purchase or sale of controlled substances, nor has Eddie JACKSON's and George BLAIR's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succeed in establishing the identities of Eddie JACKSON's and George BLAIR's co-conspirators, aiders and abettors, their places of operation for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes, and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances. My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abettors were, and where their places of operation were to transport controlled substances into an area or manufacture or distribute controlled substances about an area. Experience has shown that controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of JACKSON's and BLAIR's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation, and will do little to reveal the manufacture and distribution network. JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further

However, appellants argue that the averments were false and misleading because a government informant, Roosevelt Nabors, had been asked to become a lieutenant in the organization, but had refused on the advice of government agents. This opportunity for infiltration, they argue, would have permitted the government to investigate the organization by normal procedures. The affidavit did not discuss the invitation for Nabors to become a lieutenant. The district judge rejected this argument because, even as a lieutenant, Nabors would have had difficulty in learning all the complex details of the widespread organization, and its aiders and abettors. Moreover, in view of Nabors' lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone.

We agree with the district court's analysis. The availability of an informant who was offered and declined an opportunity to penetrate deeper into a criminal organization under investigation did not render insufficient Garibotto's statements of the need for wiretaps to discover and prove the liability of the conspirators. *See United States* v. *Pacheco*, 489 F.2d 554, 564-565, *cert. denied*, 421 U.S. 909 (1975).

Appellants' final contention regarding the wire interception is that the affidavit submitted with the application for the wiretap order did not meet the requirement of 18 U.S.C. § 2518(3)(d) that it afford the district court "probable cause

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vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution. S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation.

20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown, in connection with the commission of the above-described offenses.

for the belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of [an offense specified] . . . ." Appellants contend that the application failed to establish probable cause to believe that the telephone in the house on Hubbell Street was being, or was about to be, used to facilitate the distribution of narcotics.

The affidavit recited that on two separate occasions, on October 22 and November 4, a government informant, who consented to having government agents monitor his conversation, called the number registered to the Hubbell Street address and set up a sale at the Hubbell Street house, and the purchased substance was tested and found to be heroin. During the exchange, the agent observed the telephone ring a number of times. He saw appellants Blair and Brown answer the calls. Additionally, Garibotto averred that based upon his experience in narcotics investigations, a telephone was regularly used to negotiate the time, place, and manner of "selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances."

On review, we must view the affidavit in a common sense fashion, and we think that it afforded probable cause to believe that the telephone at the Hubbell Street address was being used to make the arrangements for a series of narcotics transactions. This is sufficient to satisfy the requirement of § 2518(3)(d).

2. The Arrests of Appellants Jones, Hurt, and Woods.

We next consider the legality of the arrests of appellants Jones, Hurt, and Woods as they left Hubbell Street on the night of December 15. Appellants argue that the government lacked probable cause to make these arrests, and that the evidence seized at the time of the arrests must be suppressed. Earlier in the evening of the night of the arrests,

the agents monitoring the Hubbell Street telephone tap overheard conversations indicating that an expected shipment of narcotics had arrived. Accordingly, a large number of government agents took up surveillance posts near the Hubbell Street house and arrested appellants as they left the structure.

The government intercepted a call from Joe Weaver to appellant Jones about 9 p.m. Weaver told Jones that "Courtney [Brown] wants to see you." Garibotto was informed of this call, and he instructed Agent Smelter that Jones was a close associate of Jackson, and that he should be arrested as he left Hubbell Street.

Agent Dockery testified that he actually arrested Jones. There was no evidence that Dockery knew that Garibotto had identified Jones as a close associate of Jackson's who should be arrested. Dockery testified that when he arrested Jones, he knew that the wire interception indicated that a large shipment of narcotics was concealed at 19315 Hubbell Street, that Weaver had called Jones and told him that Courtney wanted to see him, and that Jones was identified by another agent when he arrived at Hubbell Street. Dockery testified that based on their knowledge of the large quantity of narcotics hidden on the premises, he and the other agents had conferred and determined that anyone seen entering and then leaving 19315 Hubbell would be stopped and searched "on the probable cause that they would be carrying narcotics." He observed Jones' car pull up to the house, and saw its two passengers enter 19315 Hubbell. They departed about five minutes later. Dockery followed them for a short distance, then arrested them. A search revealed that Jones had concealed four cellophane bags containing about one pound of heroin each inside his shirt at the waistband. The evidence of the 1,924.5 grams of heroin was the basis for counts 6 and 10, distribution and possession without intent to distribute heroin.

Agents also intercepted a call from Blair to appellant Hurt on December 15. Blair stated that the heroin was on hand.

Hurt wanted a kilogram, and he was told that he would have to pay cash. Hurt asked the price, and Blair stated that he would call him back. Garibotto was informed of the call, and he stated that Hurt was a substantial customer, and if he came he should be arrested as he left.

Hurt was arrested by Agent Cigich, who testified that "supervisory agents" told him to maintain surveillance at Hubbell Street, and

> should any individual that had arrived at that address get back into their [sic] vehicles and depart, to apprehend and place under arrest the individual.

Hurt arrived and entered 19315 Hubbell. When he departed, Agent Cigich followed and arrested him some distance away. Cigich testified that he found a small packet of white powder "inside the car, lying on the floor next to the driver's front seat." The powder was tested and found to be .268 grams of heroin. Apparently Hurt was the driver and only person in the car at the time of the arrest. The heroin was offered into evidence in support of appellants' convictions on counts 7 and 11, possession and possession with intent to distribute .268 grams of heroin.

There was testimony that agents observed Woods arrive at 19315 Hubbell at about 9:40, and leave a few minutes later. He was arrested by Agent Goldenbaum. Goldenbaum testified that he had been informed by agents monitoring the wiretaps that a narcotics shipment had arrived at Hubbell Street and was being rapidly distributed. He was told to get into a radio car and take up a surveillance position. He learned that at about 9:30 two persons had been arrested leaving the premises, and were found to have suspected narcotics in their possession. At about 9:40, he was informed by radio that a 1969 Chrysler was parked in front of the Hubbell Street house, and he was told to follow it when it left and to arrest appellant Woods. A package containing 37.66 grams of cocaine and 137.5 grams of heroin was found in the pocket of his jacket.

Additionally agents seized $4,809 in cash and a pistol. This evidence was the basis of counts 8 and 9 charging distributing the heroin and cocaine, and supported the conspiracy charge.

The district court upheld each of these arrests. The court held that it was reasonable for the arresting officers to assume that the Jones who was identified arriving at Hubbell Street was the Jones who had called earlier and whom Garibotto had ordered arrested. The court held that although no one actually identified Hurt prior to his arrest, "the officers had enough facts to determine that the man they arrested was Leo Hurt, Jr., and *probably* he was violating federal narcotics statutes." Although there was no intercepted telephone call to Woods, the district court held that the agents had probable cause because they knew that the Hubbell Street house was being used as a distribution site for narcotics on the night of December 15. The court reasoned that it was extremely unlikely that a person would come to the distribution center on that night except for the purpose of illegal narcotics trafficking. Moreover, the agents knew that it was common practice in the narcotics trade to dispense a shipment quickly. Accordingly, when they saw Woods arrive and depart after only a few minutes – just as Jones and Hurt had done a few minutes earlier – they had probable cause to believe that Woods, too, would have narcotics in his possession when he left.

Neither Garibotto's knowledge about Jones and Hurt nor his orders for their arrest can be relied upon to provide probable cause for their arrests, because there was no evidence that any of his comments had been communicated to the agents on the scene who actually made or ordered their arrests.

The government contends that the information known to a superior officer may be imputed to the arresting officer, *citing United States* v. *Trabucco*, 424 F.2d 1311, 1315 (5th Cir. 1970), *cert. denied*, 399 U.S. 918 (1970), and that the collective knowledge of agents working as a team is to be considered together in determining probable cause. *E.g.*, *United States* v. *Caniesco*, 470 F.2d 1224, 1230 n. 7 (2d Cir. 1972);

United States v. *Stratton*, 453 F.2d 36 (8th Cir. 1972), *cert. denied*, 405 U.S. 1069 (1972). When a superior officer orders another officer to make an arrest, it is proper to consider the superior's knowledge in determining whether there was probable cause. Likewise, when a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest. But here, in contrast, because there was no evidence that Garibotto's order to arrest either Jones or Hurt was the basis of their arrests, his knowledge cannot be considered in determining probable cause. On the other hand, we do mutually impute the knowledge of all the agents working together on the scene and in communication with each other. Therefore it was proper to consider not only the facts known to Agent Goldenbaum when he arrested Woods, but also the information known to the officers who saw Woods visit 19315 Hubbell and ordered Goldenbaum to follow and arrest him.

When Dockery arrested Jones, he knew that Jones had received a call from the Hubbell Street telephone that evening, that narcotics were believed to be concealed on the premises, and that the person he saw enter and leave the premises was known to another agent on the scene as Alphonzo Jones. Dockery testified that he had conferred with the other agents on the scene and determined that anyone who visited 19315 Hubbell Street was likely to be carrying narcotics when he left. The district court's discussion of Woods' arrest indicates that it determined that the agents on the scene knew that 19315 was being used as a narcotics distribution center that evening, and we assume that Dockery learned as much from his conference with the other agents.

These facts are sufficient to afford probable cause to believe that Jones had been trafficking in heroin. Of course if the

government had offered evidence that the agents on the scene were aware of Jones' close association with Jackson at the time of the arrest, this additional evidence would have strengthened the probable cause. Mere presence at a place where the government believes illegal drugs will be distributed will not provide probable cause for an arrest on narcotics charges. *See Sibron* v. *New York*, 392 U.S. 40 (1968). But here we think that the agent who made the arrest did have reason to believe that it was more likely than not that Jones was in possession of narcotics when he left 19315 Hubbell. 19315 was a story-and-one-half bungalow, and agents knew that it was used as a headquarters and distribution site for narcotics. They also knew that a large shipment of narcotics had arrived. Since Dockery had a conference with the other agents, and knew of the call to Jones, we think that it is legitimate to assume that he knew that the wiretap indicated that the shipment was to be distributed to callers *that evening*. In this circumstance, as the district court reasoned in connection with Woods, it was more likely than not that a visitor on the night of December 15 was there to pick up narcotics, especially when he had been called earlier that night from the Hubbell Street address. Accordingly, the arrest was lawful and the evidence seized from Jones was properly admitted.

In the case of appellant Hurt, the same reasoning applies. Agent Cigich testified that he made the arrest because of a general order by his supervisors to arrest anyone leaving 19315 Hubbell that evening. Although the government did not prove that the call from Blair to Hurt negotiating the sale of a kilogram had been communicated to Cigich or to the other agents on the scene, we assume that the supervisory agents who gave these orders knew of the anticipated distribution from the Hubbell Street house *that evening*. As in the case of appellant Jones, there was probable cause to arrest Hurt immediately after his brief visit to the house. The totality of the circumstances suggested

no reason for his presence other than to engage in narcotics traffic.

In the case of appellant Woods, moreover, the agents had more than simply the expectation that 19315 Hubbell was to serve as a distribution site that evening. They also knew that two other persons who had arrived shortly before Woods had been arrested and were found to have suspected narcotics in their possession. Additionally, as the district court noted, the agents knew that once a narcotics shipment arrives, it is distributed very quickly. In these circumstances, we agree with the district court that the facts known to the officers who ordered the arrest of Woods, and of which they had reasonably trustworthy information, " 'were sufficient to warrant a prudent man in the belief that [Woods] had committed or was committing an offense.' " *Adams* v. *Williams*, 407 U.S. 143, 148 (1972), *quoting Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Accordingly, we hold that the evidence seized at the arrests of appellants Hurt, Jones, and Woods was legally seized, and was admissible to prove their guilt. Since we find that there was probable cause for the arrest of Cara Woods, the evidence seized at the time of the arrest was admissible, and we have no occasion to consider whether the statements he later made were independent of his arrest.

B. The Evidence Seized from the Hubbell Street Premises.

A large quantity of narcotics was seized from the house on Hubbell Street on December 15, shortly after the arrests of appellants Jackson, Brown, Blair, and Joseph and Reginald Weaver. Appellants contend that these arrests were purposely delayed until appellants were inside the Hubbell Street house, and that they were used as a pretext for making a search of the premises without a warrant.

The arrests were made at approximately 10 p.m. on December 15. According to the testimony at the suppression hearing, about 6 p.m. that evening, government agents who were

monitoring the Hubbell Street wiretaps informed Agent Garibotto that several calls suggested that a long awaited shipment of narcotics had arrived. Garibotto testified that he and government attorneys immediately began to prepare affidavits in support of a search warrant for Hubbell Street. Since these calls also indicated to Garibotto that buyers had arranged to come to Hubbell Street, he ordered the agents in the Hubbell Street vicinity to be alerted for the buyers' arrival. At approximately 9:45 Garibotto, who was on the way to the home of a district judge to present the affidavits, was notified of the arrests of Jones, Hurt, and Woods as they left Hubbell Street. He was also told that each of them was found to be in possession of narcotics when arrested. At that time Garibotto ordered the agents on the scene to arrest Jackson and the others found in the Hubbell Street house. At approximately 10 p.m. at the home of the district judge, when he was notified that the arrests had been made, and that suspected narcotics had been found in plain view, he added this information to the affidavit. The district judge issued a search warrant for the house on Hubbell Street, and a full search was made pursuant thereto. A large quantity of narcotics was found and was later introduced into evidence at appellants' trial.

Appellants contend that Garibotto purposely ordered the arrests to be made at the Hubbell Street house as a subterfuge to permit a search of the premises without a warrant. Garibotto denied that he delayed the arrests for that reason. Both appellants and the government rely upon Garibotto's statement of his purpose for ordering the arrests at that time. He testified:

> Well, the circumstances at the Hubbell address mandated that the arrest be made at that time. Our forces were diffused at the time. We knew there were a great number of customers heading to the Hubbell address to purchase heroin and cocaine. We made three arrests, there were three seizures. We knew that our forces were

> spread around the immediate vicinity. We were just concerned that the evidence that was on hand at Hubbell would be distributed to the streets and would not be seized.

The district court upheld the seizure of the challenged evidence on two grounds. First, it held that

> [d]espite substantial testimony about the arrests themselves at Hubbell, no persuasive facts were presented to support defendants' allegation that Jackson could have been arrested prior to his entering the house on Hubbell.

Additionally, the court held that even assuming that the agents had improperly delayed the arrests to gain entry into the house without a warrant, the search that was later conducted pursuant to a warrant was not tainted. The court reasoned that the district judge, who received lengthy affidavits prepared *before* the arrests (to which only one handwritten paragraph had been added *after* the arrests), had before her sufficient unchallenged facts to afford probable cause for a search. The improper addition could therefore be ignored.

Our court has repeatedly made it clear that:

> An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment. If, in fact, the primary purpose of forcibly entering a person's home is to search for evidence with which to convict him of crime, the evidence so obtained is not admissible in court.

United States v. *Harris*, 321 F.2d 739, 741 (6th Cir. 1963), *quoted in United States* v. *Carriger*, No. 74-1901 (6th Cir. 1976, decided and filed, August 25, 1976) [Footnote omitted]. As Chief Judge Cecil stated in *Harris*,

> The real purpose of the agents must be determined from all of the facts and circumstances surrounding the

> arrest of the defendant and the search of his apartment. The court is not bound to accept the purpose as stated by the agents as controlling.

321 F.2d 741.

Appellants argue that probable cause to arrest Jackson, Brown, and Blair existed after the October 22 and November 4 sales to the undercover agent. Moreover, they emphasize that Jackson was under government surveillance before he arrived at Hubbell Street, but he was not arrested until *after* he was on the premises. They argue that Garibotto's statement quoted above admits that his purpose in ordering the arrests was to permit the warrantless search and seizure of narcotics.

Although the district court did not focus on the issue as stated in *Harris*, its determination that the defendants did not prove that Jackson could have been arrested sooner implies that the government did *not* make the arrests as a pretext for a warrantless search. The arrests were ordered as soon as the buyers who had called earlier left the premises, were arrested, and were found to be in possession of narcotics. Taken with the reports of the outgoing calls from Hubbell setting up additional sales, this firmly established that the narcotics shipment had arrived, and that the occupants of the house were distributing it rapidly. This knowledge afforded probable cause to arrest all the occupants of the house, not just Jackson. Moreover, we think that Garibotto's testimony indicates that there was real concern for preventing the unlawful distribution of a large shipment of narcotics to other purchasers, as well as a desire to effect the arrests while there was sufficient manpower available. The record does not indicate that the government was trying to avoid getting a warrant to search Hubbell Street. In fact, when Garibotto ordered the arrests he was on his way to the home of a district judge with detailed affidavits, and he added only a brief handwritten statement after he learned of the arrests. The district judge actually

issued a warrant within minutes of the entry and arrests. No search of the premises was made until the warrant was issued.

The facts and circumstances surrounding the arrests thus demonstrate that the government did not manipulate the arrests in order to avoid the Fourth Amendment warrant requirement, and we hold that the evidence seized from Hubbell Street was properly admitted.

C. Formal Voice Exemplars.

Appellants contend that the district court's order requiring them to give formal voice exemplars violated their privilege against self-incrimination and constituted an illegal search and seizure. Accordingly, they argue that neither the exemplars nor identification testimony based upon the exemplars was admissible. In *United States* v. *Franks*, 511 F.2d 25, 33 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) we rejected these arguments, holding:

> Mitchell and Britton claim that the court order compelling them to give voice exemplars violated their constitutional right against unreasonable searches and seizures and their constitutional privilege against self-incrimination. United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), established that compelling voiceprints even of the same words used in the crime does not violate the constitutional privilege against self-incrimination. Accord, United States v. Rogers, 475 F.2d 821, 825-826 (7th Cir. 1973). Moreover, compelling a voiceprint is neither a "search" nor a "seizure." *Dionisio*, 410 U.S. at 14-15, 93 S.Ct. 764. We reject Mitchell's attempt to limit *Dionisio* to the grand jury context in that, so long as the underlying seizure of the person is proper, requiring that person to submit voice exemplars violates no constitutional right. See United States v. Rogers, 475 F.2d 821 (7th Cir. 1973) (court-ordered submission); United States v. Sanders, 477 F.2d 112 (5th Cir.), cert. denied, 414 U.S. 870, 94 S.Ct. 88, 38 L.Ed.2d 88 (1973) (legally in custody on another matter).

D. Informal "Aural Show Ups."

Appellants also contend that their Fourth Amendment rights and their privilege against self-incrimination were violated, and their Sixth Amendment right to counsel denied, at a series of informal "aural show ups." Appellants allege that government agents created opportunities to speak to each of the appellants both in person after their arrests, and later over the telephone by setting up a lengthy procedure for the return of their seized property. Agents testified that they did not give the warnings detailed in *Miranda* v. *Arizona*, 386 U.S. 436 (1966) when they spoke to appellants on these occasions,[12] and appellants did not have their counsel present.

As we stated in connection with the formal voice exemplars, *supra*, neither the Fourth Amendment nor the privilege against self-incrimination is violated by the disclosure, even if compelled, of a person's voice. Appellants' complaint is not that their statements were used to incriminate them in a testimonial sense, but that the agents were able to recognize their voices on the tapes after having heard them in person and over the telephone.

Appellants also claim, however, that because the "aural show ups" formed the basis for the critical testimony identifying their voices on the tapes, they were critical stages at which the Sixth Amendment guaranteed appellants' right to counsel. A review of the testimony indicates that Agent Garibotto did speak to several of appellants briefly after their arrests, and later over the telephone. These conversations appear to have been brief and matter of fact, concerning such routine matters as the return of property which had been seized. There is no requirement that counsel be present for conversations about such routine matters when no effort at interrogation is made.

---

12 Appellants do not contend that they were not given their *Miranda* warnings before formal custodial interrogations.

IV. WAS THERE SUFFICIENT PROOF OF APPELLANTS' GUILT ON EACH OF THE COUNTS?

Next we consider the sufficiency of the proofs supporting appellants' convictions on the various counts of the indictment. First, appellants assert that the *Pinkerton* rule should not be applied to convict defendants, found to be conspirators, of each of the substantive counts without proof that each defendant actually took part in the individual transactions. Second, several appellants challenge the sufficiency of the evidence linking them to the conspiracy. Last, we will consider challenges to the proofs on counts 3, 4, 8 and 9.

A. The Pinkerton Rule.

Appellants vigorously attack the validity of the rule announced in *Pinkerton* v. *United States*, 328 U.S. 640 (1946) that even if he did no more than join a conspiracy, a conspirator can be convicted of any substantive offense committed in furtherance of the conspiracy and as a part of it. Appellants contend that the *Pinkerton* rule is bad law, and that this court should not follow it. Our court, however, is constitutionally required to follow the Supreme Court's decision in *Pinkerton* and the cases following it, which have never been overruled, or even questioned by the Supreme Court.

B. The Sufficiency of the Evidence of Conspiracy.

Appellants Kilpatrick, Riggs, Rudolph, Cavanaugh, Horne, Hurt, and Garrett challenge the sufficiency of the evidence supporting their convictions. Since each of them was found guilty of conspiracy, count 1, under the *Pinkerton* rule, they could also be convicted of counts 3 and 4 and counts 6 through 16, which charged crimes that were part of and in furtherance of the conspiracy. Appellants contend, however, that there was insufficient evidence to support their convictions on the conspiracy charge.

In reviewing the sufficiency of the proof of appellants' guilt, we will be guided by the following general principles. The evidence will be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942). Moreover, there are special evidentiary rules applicable to conspiracy cases. As we stated in *United States* v. *Mayes*, 512 F.2d 637, 651 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975):

> a prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator. . . . However, a prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance. . . . Moreover, the prima facie case need not be established before the proffered hearsay may be admitted; the judge may admit it conditionally. It is sufficient if at the close of the government's proofs, a prima facie case of conspiracy and the defendant's conection with it has been established by "independent or disassociated evidence."

Applying these principles, we turn to the evidence that is claimed to support the finding that each of these appellants were conspirators.

Willie Lee Kilpatrick

Appellant Kilpatrick was convicted of conspiracy, count 1, by Judge Pratt, and under the *Pinkerton* rule he was also convicted on counts 3, 4, and 6 through 16. We hold that the evidence was adequate to support his conviction on the conspiracy count, and we have already discussed the *Pinkerton* rule *supra*. The following evidence supported the district court's conclusion that Kilpatrick "was involved in narcotic trafficking, was clearly associated with defendant Jackson and connected with the other conspirators . . . [and] was in the 'lieutenant' echelon of the Jackson organization. . . ." Kilpatrick flew to New York with appellant Riggs (Jackson's girlfriend), who was arrested carrying a quantity of narcotics when she attempted to return to Detroit. Informant Nabors testified that he observed Kilpatrick at 19315 Hubbell Street at the time scheduled for a meeting of the Jackson organization lieutenants. When Nabors refused the organization's invitation to become a lieutenant, he was not allowed to stay. A search of Kilpatrick's apartment produced substances used to dilute heroin, narcotics paraphernalia, and firearms. Kilpatrick's address book listed the names of other conspirators, and he was likewise found listed in their books.

Lee Hurt

Judge Feikens convicted appellant Hurt on count 1 because he found beyond a reasonable doubt that Hurt purchased from the Jackson organization large quantities of narcotics for wholesale distribution. The district court took special note of a call that Hurt made by Blair in which Hurt stated that his customers were complaining about the quality of the narcotics he had sold them. Judge Feikens observed that Hurt was mentioned in the telephone and address books of several of the conspirators. Finally, Hurt was called to the Hubbell Street house on December 15 when the large shipment was being distributed, and he was arrested with heroin in his possession when he left. Although the heroin was found in Hurt's car, not on his person, there was ample evidence to support a finding of possession, since he was apparently the only person in the car, and the heroin was found on the floor by the driver's seat. This evidence is sufficient to support the conclusion that Hurt, like Cavanaugh and Rudolph, was a major distributor for and a member of the conspiracy. Accordingly, we affirm Hurt's conviction on count 1. Under the *Pinkerton* rule, the conviction on count 1 permitted his conviction on the counts charging the substantive crimes committed in furtherance of the conspiracy as well, including count 7. Accordingly, we need not discuss Hurt's argument

that there was insufficient evidence to convict him on count 7, although we conclude that even without the *Pinkerton* rule, there was sufficient evidence to sustain his conviction on this charge.

Hurt also contends, relying upon *Kotteakos* v. *United States*, 328 U.S. 750 (1946), that the evidence shows only a "hub and spoke" cluster of several conspiracies, each between an individual dealer and the "hub" consisting of Jackson and his lieutenants. In *Kotteakos*, however, defendant Brown specialized in obtaining loans from the Federal Housing Administration by false and fraudulent applications. Several defendants, each of whom had obtained such a loan falsely and fraudulently, were charged with and convicted of a single all-encompassing conspiracy. The Supreme Court held that there was proof, not of a single, but of several conspiracies, and reversed the convictions.

Hurt, however, was a distributor with an ongoing relationship with the conspiracy to distribute illegal narcotics. He depended for his success upon the continuing vitality of the entire conspiracy. This is particularly true in the narcotics business, because new customers of each seller may become, by reason of addiction, a lifetime potential market for all other sellers.

Fairh Lee Riggs

Judge Feikens convicted appellant Riggs of conspiracy, count 1, concluding that she knowingly and intentionally joined the conspiracy, and that she was "an important courier in the transportation of narcotics" as well as "an intimate associate of Jackson." We hold that the evidence was sufficient to convict Riggs of conspiracy. Riggs had travelled to New York with appellant Kilpatrick and defendant Reynolds in September 1971. All three used assumed names. When airlines personnel examined appellant Riggs' carry-on luggage, they observed an estimated $30,000 in cash in a paper bag. Riggs

was arrested later that day when she returned to the New York airport for a return flight to Detroit. Her luggage contained 1,917 grams of heroin and almost $5,000 in cash. She was convicted of possession of the heroin in the Eastern District of New York, and the conviction was affirmed. *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). By stipulation, the record in the New York case was incorporated into these proceedings. Riggs was Jackson's girlfriend. He arranged to take calls from another conspirator at her house. Riggs' name and telephone number, along with those of several other appellants, were found in appellant Rudolph's address book. This evidence was adequate to establish a prima facie case that appellant Riggs knowingly joined the conspiracy. Accordingly, other evidence of hearsay statements by other conspirators was admissible to strengthen the case against Riggs. Burt's testimony indicated that the Jackson organization procured several large shipments of narcotics from a source in New York. Additionally Jackson told Burt that he believed the Riggs arrest must have been a "set-up" because the two men with her were not arrested. Jackson tried to raise a large sum because his "old lady" was in jail in New York, and Blair told Burt that Jackson was trying to find a lawyer for Riggs. This evidence amply supports the conviction of Riggs on count 1.

Samuel (Eugene) Horne

Judge Feikens concluded that it was "clear beyond a reasonable doubt that defendant Samuel Horne knowingly and intentionally joined the conspiracy." He concluded that Horne's "principal activity" for the organization was "wholesale distribution of narcotics." The government intercepted telephone conferences between Horne and Joseph Weaver, Brown, Blair, and Jackson. In particular, Judge Feikens noted that on December 9 Horne called Jackson and attempted to arrange a sale to a customer who wanted a "full thing" for

$15,000. This evidence was more than ample to support Horne's conviction of conspiracy.

Charles Cavanaugh

Judge Feikens convicted Cavanaugh of count 1, conspiracy, holding that he was one of the organization's "wholesale distributors," and that he "engaged in other kinds of supply activity for the group." Burt testified that she and Blair delivered cocaine to Cavanaugh in exchange for three outfits of clothing. The wiretap intercepted a number of calls from Cavanaugh to the Hubbell Street telephone inquiring about the availability of narcotics. Cavanaugh indicated his familiarity with various key members of the organization by calling and asking to speak to "George [Blair], Brown, or the big man [Jackson]." In these calls Cavanaugh made arrangements for sales, complained about the quality of the narcotics that he had received, saying at one point that he had had to return his customers' money. On December 14 Jackson agreed to sell Cavanaugh 13 quarters of heroin.

This evidence was more than sufficient to prove Cavanaugh's part in the conspiracy. *See, e.g., United States* v. *Tramunti*, 513 F.2d 1087, 1112 (2d Cir.); *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Varelli*, 407 F.2d 735, 748 (7th Cir. 1969), *cert. denied, sub nom. Saletko* v. *United States*, 405 U.S. 1040 (1972); *United States* v. *Aviles*, 274 F.2d 179, 188 (2d Cir. 1960).

Charles Rudolph

Judge Feikens also convicted appellant Rudolph on the conspiracy count. He held that Rudolph was "deeply involved in wholesale distribution of drugs for the group." Judge Feikens cited as evidence Rudolph's telephone calls, his account records, and his automatic telephone dialing cards for other conspirators, as well as the fact that Rudolph was listed in the telephone and address books of other conspirators. In one

telephone call, Rudolph told Brown he was "getting low," and he would take a quantity of narcotics being held for another buyer if that transaction did not go through. Brown called Rudolph a few days before the last big delivery to tell him that the narcotics would be around in a few days, and Rudolph said that he would wait. An outgoing call to Rudolph's telephone was made from Hubbell Street on December 15 when the expected shipment was being distributed, but there was no answer. A search of appellant's home yielded 417 grams of heroin, common diluents, guns, ammunition, and a record book including the names of other conspirators and sums of money. This evidence established a prima facie showing of his status as a conspirator, and made admissible Burt's testimony that Blair told her Rudolph had once been a Jackson lieutenant, but that he "broke away" and now specialized in selling "quarters" of heroin and cocaine. It is immaterial that Rudolph no longer served the Jackson organization as a lieutenant, since he still acted as a major distributor for the organization. The evidence adequately supports his conviction.

Ronald Garrett

Judge Feikens found appellant Garrett guilty of conspiracy on the basis of the following evidence: Garrett's telephone number was listed in Kilpatrick's address book and in Rudolph's telephone and address book, and he had a substantial account listed in Rudolph's account book. Additionally, Garrett figured prominently in a number of intercepted telephone conversations. Since Garrett was not one of the speakers in these conversations, they are admissible to prove the truth of the matters asserted only if a prima facie case is made that Garrett was one of the conspirators. However, Judge Feikens properly relied upon the fact that several of the conspirators mentioned Garrett repeatedly in the course of discussions regarding their narcotics transactions. Evidence that

his name was mentioned repeatedly in the context of the narcotics transactions was not hearsay, and was competent evidence tending to show that he was a conspirator. It should be unnecessary to emphasize that proof of an illegal conspiracy is seldom direct. More often, there is only indirect proof of the unlawful agreement. We are required by *Glasser* to view the evidence in the light most favorable to the government. Accordingly, we hold that a prima facie case of conspiracy, although a minimal one, is established by the evidence of the telephone calls, considered together with the address books and Rudolph's account book, which indicated a substantial sum of money for Garrett, as well as for other persons shown to be conspirators. Accordingly, the substance of the telephone conversations, in which other conspirators' statements indicated Garrett's deep involvement, was admissible. In addition, Burt's hearsay testimony that she helped Blair make a delivery which he said was for "Five-O" was admissible to prove Garrett's complicity. Burt identified Garrett as "Five-O" at trial. This evidence was adequate to support Garrett's conviction on count 1.

C. Counts 3 and 4

Appellants Brown, Bell, Riggs, Horne, Garrett, Jones, and Rudolph challenge the sufficiency of the evidence to support their convictions of count 3, the October 22 sale to Special Agent Smith, and of count 4, the November 4 sale. Since we have affirmed their convictions of conspiracy under count 1, appellants were properly convicted of the substantive charges in these counts as well under the *Pinkerton* rule.

D. Counts 8 and 9

Appellants challenge the validity of convicting them on count 8 (distribution of 137.35 grams of heroin) and count 9 (distribution of 37.66 grams of cocaine) in view of the fact that the district court acquitted Cara Woods, in whose possession the heroin and cocaine were found, of the conspiracy charge. Appellants contend that since Woods was not a member of the conspiracy, his statement to Agent Garibotto regarding the source of the narcotics was hearsay and therefore not admissible to prove the guilt of the conspirators. Accordingly, they argue that there was no proof that Woods had obtained the narcotics from 19315 Hubbell. We disagree. There was compelling circumstantial evidence that the heroin and cocaine referred to in counts 8 and 9 were procured from the Jackson organization at 19315 Hubbell. Woods visited the Hubbell Street address briefly on the night of the 15th of December when a large shipment of narcotics was being rapidly distributed, and when he was arrested just as he left he was found in possession of the narcotics. Minutes before two other persons had entered briefly, and when they left they too had been arrested and were found to be in possession of narcotics. We thing that this is ample evidence to support a finding that the narcotics seized from Cara Woods were distributed by the Jackson organization, and that therefore all of the conspirators could be convicted of counts 8 and 9 under the *Pinkerton* rule.

V. WERE BLAIR AND HURT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

Appellant Blair argues that although the two defense attorneys who represented all defendants at the trial were very well qualified, he did not receive effective assistance of counsel because of the inherent conflict of interest between their representation of Jackson, the "kingpin" or "boss," and that of minor defendants such as Blair. He argues that he did not even have a fee-paying relationship with the defense attorneys, who were primarily concerned with Jackson. He also contends that conflict arose between himself and the other defendants when proof was introduced about his secret efforts to secure immunity in return for the testimony of Ruth Ann Burt.

However, the record reveals that in open court, Blair declined the tendered option of having his case severed from that of the other defendants, with separate counsel appointed to represent him. Blair was not present in the courtroom for the first five days of trial, and the district court granted the government's motion to sever him. On the sixth day, however, Blair appeared in court, and counsel for all of the defendants stated that Blair still wished to be tried with the other defendants. Blair was questioned both by defense counsel and by the court about his willingness to waive his right to be present for the first days of the trial. He waived that right, his right to trial by jury, and agreed to the simultaneous bench trial. He was also questioned as follows:

> Mr. Rothblatt: And you also understand on this indictment Mr. Henry and I represent a number of other defendants, as well as yourself, and it's been suggested there is a possibility there may be some confliction, because we represent some of the other defendants; we may not be representing you as effectively as we might be, since we represent other defendants. Now, you understand you have a right to any other attorney represent you, and if you can't afford a lawyer, the Court will assign a lawyer to you free of charge; do you understand that?
>
> Mr. Blair: Yes.
>
> Mr. Rothblatt: And you agree that Mr. Henry and I and Mr. Halpern will continue with your representation, along with the other defendants in this case?
>
> Mr. Blair: Yes.

Blair first made a claim of ineffective assistance of counsel in a motion for a new trial. The district court held that mere dissension or hostility between defendants does not render their representation by the same counsel inadequate. The court observed that Blair's request to be tried with the other defendants could be treated as a waiver of this objection. Finally, the court determined that his

> allegation that his counsel had difficulty keeping his defense at heart is totally without support in the record. It shows that defendant expressly chose his counsel after the court explained his right to be represented by an attorney of his choice and that the attorney chosen ably represented him at all stages of the trial.

The Sixth Amendment guarantees the right to counsel in criminal proceedings, and a conflict of interest on the part of counsel representing two defendants may deprive the accused of the effective assistance of counsel. *Glasser* v. *United States*, 315 U.S. 60 (1942). However, the mere fact of joint representation does not *per se* establish a denial of the effective assistance of counsel. *United States* v. *Wayman*, 510 F.2d 1020, 1025 (5th Cir. 1975), *cert. denied*, — U.S. — (19—). Our court requires a party claiming that joint representation resulted in a conflict of interest to demonstrate that some actual prejudice resulted to him. *United States* v. *Burkeen*, 355 F.2d 241, 244 (6th Cir.), *cert. denied sub. nom. Matlock* v. *United States*, 384 U.S. 957 (1966); *United States* v. *Cale*, 418 F.2d 897 (6th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970).

Here appellant identified two grounds of conflict. First, he argues that he was only a minor party, and that counsel was concerned primarily with the "kingpin" of the organization. The record does not bear this argument out. Blair was shown to be one of Jackson's primary aides, or lieutenants, not just a minor figure. Moreover, the district court found, and we agree, that counsel ably represented Blair. Second, Blair contends that the disclosure of his secret attempts to gain immunity drove a wedge between him and the other defendants. Although some of the other defendants may have had reason to feel that Blair had acted disloyally to *them* in a personal sense, he has not demonstrated that this hostility affected counsels' ability to continue joint representation. Blair's defense was not shown to be inconsistent with that of Jackson or the other co-defendants. All, for example, were equally eager to dis-

credit the testimony of Burt, Blair's former wife. We find no actual conflict of interest preventing adequate representation of appellant Blair. Moreover, it would be especially inappropriate for us to infer prejudice from the mere fact of joint representation where, as was the case here, the defendant was advised of the possibility of a conflict of interest, and of his right to sever his case and be represented by separate appointed counsel.

Appellant Hurt also attacks the adequacy of his representation by counsel. Compared to appellant Blair, Hurt was a lesser figure in the conspiracy. Nevertheless, Hurt has not carried his burden of proving the existence of a conflict of interests between himself and the more important conspirators that resulted in actual prejudice to him. He had more than minimal contacts with the conspiracy, and repeatedly obtained narcotics for distribution.

Hurt concedes that counsel succeeded in securing acquittal for some defendants. He argues that because the trial court concluded that the evidence against him was "not as overwhelming" as against the other convicted defendants, truly adequate representation would have secured acquittal. But the trial court's conclusion is equally consistent with adequacy of representation insofar as it indicates that, unlike most other defendants, Hurt's defense was almost successful.

VI. WERE THE SENTENCES IMPOSED BY JUDGE FEIKENS IMPROPER?

Appellants' final contention is that the sentences imposed by Judge Feikens on the defendants tried before him were improper because they were imposed in deference to community sentiments, and to deter future violators without regard to the "militating" [sic mitigating?] factors in the individual cases. They also contend that the sentences imposed by Judge Feikens were harsher than those imposed by Judge Pratt for identical conduct.

It is well settled that except in the most exceptional circumstances, an appellate court will not disturb a sentence that is within the limits set by statute. The severity of a sentence is normally committed to the discretion of the trial court. *See Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974); *United States* v. *Phillips*, 510 F.2d 134 (6th Cir. 1975). Appellants do not contend and cannot demonstrate that the sentences imposed by Judge Feikens exceeded the maximum limits permitted by statute. Instead, they contend that the sentences were not set with proper regard for the individual circumstances of each defendant, and that they should have been more compatible with those imposed by Judge Pratt. The record, however, indicates that Judge Feikens did take the individual circumstances of the defendants and the enormity of their offenses into consideration in determining the proper sentences, and we find no abuse of his discretion.

VII. CONCLUSION.

We have determined that the contentions which we have not treated above do not require discussion. We also observe that it is indeed rare for a lengthy trial not to produce some errors, and this unusual proceeding is no exception to the general rule. In some cases, the cumulative weight of a large number of errors otherwise inconsequential in isolation might render a proceeding unfair. We have examined this record with that possibility in mind and have concluded that in spite of minor errors, this was a fair trial for all appellants.

For the foregoing reasons, the judgments of conviction are AFFIRMED.

NOS. 74-2338 thru 74-2353
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

- vs - ORDER

WILLIE LEE KILPATRICK, et al.,

Defendants-Appellants

BEFORE: CELEBREZZE and MC CREE, Circuit Judges.

The petition for rehearing with suggestion for en banc consideration having come on to be heard, and appellee's response to the petition for rehearing having been received and considered, and no judge having requested a vote on the suggestion for rehearing en banc, and the motion having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court

FILED

/s/ John P. Hehman
Clerk

FEB 2 1977

JOHN P. HEHMAN, Cler

ORDER

Nos. 74-2338, 74-2339, 74-2340,
74-2342, 74-2343, 74-2345,
74-2346, 74-2349, & 74-2350

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
) ORDER
v.)
)
WILLIE LEE KIL-)
PATRICK, JOSEPH)
LEON WEAVER,)
JAMES REGINALD)
WEAVER, COURTNEY)
BROWN, HERBERT)
BELL, SAMUEL)
HORNE, ALPHONZO)
JONES, LATICIA)
BURNS AND MAURICE)
THOMPSON,)
)
Defendants-Appellants)

Upon consideration of the defendants-appellants' motion to stay the mandate,

It is ORDERED that the mandate be stayed until March 2, 1977. Any further requests to stay the mandate should be directed to the Supreme Court of the United States in conjunction with the filing of any petition for writ of certiorari.

FILED

FEB 15 1977

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

JOHN P. HEHMAN, Cler

SUPREME COURT OF THE UNITED STATES

No. A-699

WILLIE LEE KILPATRICK, COURTNEY BROWN, SAMUEL HORNE AND ALPHONZO JONES,
Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 4, 1977.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of February, 1977.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 25, 1977

Milton R. Henry, Esquire
2211 E. Jefferson Avenue
Detroit, Michigan 48207

Re: Willie Lee Kilpatrick, Courtney Brown, Samuel Horne and Alphonzo Jones v. United States, A-699 and A-700

Dear Mr. Henry:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case (A-699), has been presented to Mr. Justice Stewart who, on February 24, 1977, signed an order extending your time to and including April 4, 1977. A copy of the Justice's order is enclosed.

Your application for stay in this same case (A-700) was also presented to the Justice, who has endorsed thereon the following:

"Motion to Stay mandate denied
February 24, 1977
Potter Stewart"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson
Francis J. Lorson
Deputy Clerk

th
Enc.

cc: Hon. Daniel M. Friedman
Acting Solicitor General of the U.S.

Clerk, U.S. Court of Appeals for
the Sixth Circuit (Your Nos. 74-2337-53)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1314

WILLIE LEE KILPATRICK, COURTNEY BROWN, HERBERT BELL, SAMUEL HORNE, ALPHONZO JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL ADDENDUM TO REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI RELATED TO THE JURY QUESTION

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Attorney for the Petitioners

February 21, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1314

WILLIE LEE KILPATRICK, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL ADDENDUM TO REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI RELATED TO THE JURY QUESTION

As an addendum to the reasons for allowance of the Writ of Certiorari sought to review the judgments below, to be added to those reasons terminating in the filed petition on page 46 thereof, the petitioners cite the following facts and circumstances which have, following the printing of their petition become critically important to the issuance of the Writ of Certiorari sought.

On March 23, 1971, in the Eastern District of Michigan, the HON. ROBERT E. DE MASCIO, in the

case of *United States v. Coleman, Black,* and *Foster,* being CR #s 6-81420, 6-81329, and 6-81452, quashed existing indictments because of the Court Clerk's failure to follow the Statutory Scheme for the filling of the Master Wheel, in accordance with the strict provisions of the Jury Plan.

In quashing the indictments Judge DE MASCIO cited the case of *United States v. Okiyama,* 521 F.2d 601, 9th Cir., 1975, as standing for the proposition that a showing of prejudice by a complaining defendant, resulting from a failure to comply with the provisions of the local Jury Plan, need not be made to entitle such defendant to the quashing of his indictment. All, he claimed, need be shown is the violation, and that, of itself, entitles the defendant to quashing of his indictment.

Because of the announcement of Judge DE MASCIO's opinion, three prosecutions and three indictments have been quashed; and doubtless there will be many more to follow in the wake of this decision.

However, as is true in the within case, JUDGE FEIKENS, whose order sustaining the indictments herein is now being appealed to the Supreme Court, again, in the case of *United States v. Henry William Tarnowski,* CR #6-81003, filed March 17, 1977, again refused to give the jury plan such an interpretation, and declined to quash indictments similarly affected by the same practices as those dealt with by Judge DE MASCIO in the Coleman, and companion, cases.

What was stated by Judge DeMascio in his opinion bears reprinting here to wit:

The identical issues presented in these cases were considered and decided by the Honorable John Feikens in *United States v. Henry William Tarnowski,* Crim. No.

6-81003 (filed Mar. 17, 1977). I sincerely regret that I cannot adopt the holding in *Tarnowski.* A discussion of that opinion, I am sure, will clarify the reasons for my disagreement. In *Tarnowski,* the court concludes that "time is not of the essence of the Act." I am persuaded, however, that the time requirements set forth in the plan are as essential as any other provision. It is this very time requirement that assures the mechanical process that Congress intended and that guarantees that the Master Wheel will contain, at all times, a cross section of the community. The Act certainly anticipates that time is an essential consideration. The Act provides that the interval for refilling the Master Jury Wheel is to be established in the plan. By amending the Act in 1972, Congress made it apparent that time was an essential feature in the plan by specifying that no plan would extend beyond four years without refilling the Master Jury Wheel. When our court, on December 8, 1976, amended the plan to provide for refilling the Master Jury Wheel every four years, the reviewing panel refused to approve the backdating of that amendment, no doubt believing the plan had conferred a statutory right. The court in *Tarnowski* reasons that "... Congress intended that voter registration lists should be supplemented by other sources whenever the voter registration lists [do] not adequately reflect a cross section of the community." This district had declared, however, and the reviewing panel has agreed, that voter registration lists are a completely adequate source to assure a cross section of the community. Our plan specifies the use of voter registration lists and makes no provision for obtaining names from any other source. The plan specifically provides for refilling every two years *as new voter registration information* becomes available.

Next, in *Tarnowski,* the court concludes that a court must find that there has been a substantial failure to comply with the Act, and "the question cannot simply be–is there a substantial failure to comply with *the plan*?" Thus, the court in *Tarnowski* distinguishes between the statute and the plan. This district, however, formulated the plan because it was required by the statute to do so. I believe that the Act and the legislative history supports only the conclusion that the plan is incorporated into the Act and is one and the same. Nor can I agree that the cases relied upon by Judge Feikens support the *Tarnowski* conclusion that a defendant must show that the deviation resulted in a Master Jury Wheel which does not "mirror the structure of the community." 1968 U.S. Code Cong. & Ad. News at 1805. To require the defendant, as the court does in *Tarnowski,* to demonstrate that there has been a failure on the part of the Clerk to provide a fair cross section of registered voters in the Master Jury Wheel is to require the defendant to demonstrate prejudice. But the Act gives a defendant the right to rely upon the district plan. It is the plan that gives a defendant assurance that the Wheel will at all times contain a fair cross section of the community. When that plan is substantially violated, a defendant may rely on the fact that the Wheel is deficient for "procedural regularity is the measure of the validity of the selection system." 1968 U.S. Code Cong. & Ad News at 1805. Nor do I believe that the inquiry whether the Clerk's conduct was deliberate or merely nonfeasance is not relevant. The simple fact is that there was a substantial failure to comply with the Act. 28 U.S.C. §1867(a). I am persuaded that to sanction a failure to adhere to the plan is to sanction a *de facto* modification without the

required approval of the reviewing panel contrary to 28 U.S.C. §1863(a).

For these reasons, I remain persuaded that the indictments must be dismissed.

IT IS SO ORDERED.

ROBERT E. DE MASCIO
U.S. DISTRICT JUDGE

Thus, because of the evident confusion and conflict which exists in the Eastern District of Michigan, and which goes on unabated, simply because the court refuses to speak on the issues which these appellants raised years ago, ample basis exists for the allowance of certiorari defining what type of error requires the quashing of an indictment, and outlining clearly what departures from procedure are to be condemned.

Accordingly, the petitioners urge that certiorari should be granted in the within case to remove the existent confusion, with a minimum of delay.

Respectfully submitted,

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Nos. 76-1314 and 76-1360

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIE LEE KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EDDIE JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE,
Acting Solicitor General,

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INDEX

CITATIONS

Cases:

Page

Cases—continued:

Page

Constitution, statutes and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1314

WILLIE LEE KILPATRICK, ET AL., PETITIONERS

v.

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EDDIE JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 544 F. 2d 242.[1]

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[1]Unless otherwise noted, "Pet." references are to the petition in No. 76-1314.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1976. A petition for rehearing was denied on February 2, 1977. Mr. Justice Stewart extended the time for filing the petitions for a writ of certiorari to and including April 4, 1977. The petition in No. 76-1314 was filed on March 18, 1977, and the petition in No. 76-1360 was filed on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures followed in selecting the grand jury that indicted petitioners complied with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the Jury Selection Plan of the United States District Court for the Eastern District of Michigan (No. 76-1314).

2. Whether the government improperly used the grand jury as an instrument for discovery in connection with petitioners' trial (No. 76-1314).

3. Whether petitioners' Sixth Amendment rights were violated by a meeting between government agents and one of petitioners' co-defendants, which was held without notifying the co-defendant's counsel (No. 76-1314).

4. Whether the government's applications for a wire interception order and an extension thereof were properly authorized under 18 U.S.C. 2516(1) (both petitions).

5. Whether the government's application for a wire interception order sufficiently established that other investigative procedures were inadequate, as required by 18 U.S.C. 2518(1)(c) (both petitions).

6. Whether, in the circumstances of this case, petitioners were properly convicted on five separate counts of possession with intent to distribute a controlled substance (No. 76-1314).

7. Whether, in the circumstances of this case, petitioners were properly convicted of substantive offenses committed by their co-conspirators in furtherance of the conspiracy (both petitions).

STATEMENT

On January 5, 1972, two indictments were returned in the United States District Court for the Eastern District of Michigan charging petitioners and a number of other persons with conspiracy to manufacture, distribute, and possess heroin and cocaine, in violation of 21 U.S.C. 846, and with numerous substantive narcotics offenses, in violation of 21 U.S.C. 841. In 1974 the two cases were tried simultaneously, without juries, before Judges Feikens and Pratt. Each of the petitioners, as well as many of the other defendants, was found guilty on the conspiracy count and several of the substantive counts and was fined and sentenced to a substantial prison term.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-51a).

Briefly, the evidence at trial established the existence from September through December 1971 of a wide-ranging narcotics conspiracy, known as the "Jackson organization" after its leader, petitioner Eddie Jackson (C.A. App. A 150-152, 180).[3] Petitioners Courtney Brown and Herbert Bell,

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[2]The sentences imposed upon petitioners are set forth in the opinion of the court of appeals (Pet. App. 3a n. 1).

[3]"C.A. App. A" refers to Section A of the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court. The findings of fact of Judges Pratt and Feikens are reprinted at C.A. App. A 149-167 and 168-192, respectively. Judge Feikens' findings are also set forth at Pet. App., No. 76-1360, pp. 63a-88a.

along with co-defendant George Blair,[4] were Jackson's chief lieutenants (C.A. App. A 180). Petitioner Willie Lee Kilpatrick, who was also part of the organization's leadership, was involved in the procurement and distribution of narcotics (C.A. App. A 152-153), while petitioner Fairh Lee Riggs was a narcotics courier (C.A. App. A 180) and petitioners Alphonzo Jones, Samuel Horne, Ronald Garrett, Charles Rudolph, and Charles Cavanaugh were preferred customers and wholesale distributors for the organization (C.A. App. A 180-181, 183-184).

ARGUMENT

Each of the claims raised by petitioners was correctly resolved against them by the court of appeals in an extensive opinion upon which we principally rely.

1. Petitioners in No. 76-1314 contend (Pet. 33-34) that the members of the grand jury that indicted them were not selected in accordance with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the Jury Selection Plan of the United States District Court for the Eastern District of Michigan because an outdated voter registration list was used, an unauthorized person assisted the jury clerk in compiling names for the jury wheel, and jury selection records were improperly removed from the court house. These same claims, on identical facts, were rejected in *United States* v. *McNeal*, 490 F. 2d 206 (C.A. 6), certiorari denied, 419 U.S. 1020, in which the court of appeals found that the most recent available voter registration list for a federal general election had been used in selecting the grand

[4]This Court has denied the petitions for a writ of certiorari filed by defendant Blair and two other co-defendants, Leo Hurt and Cara Woods. See *Blair* v. *United States*, No. 76-1247, certiorari denied, April 18, 1977; *Woods* v. *United States*, No. 76-1213, certiorari denied, April 18, 1977; *Hurt* v. *United States*, No. 76-771, certiorari denied, January 17, 1977.

jury[5] and that the procedure followed by the jury clerk had otherwise been in substantial compliance with the statute and the local plan and was not prejudicial. Petitioners' objection to the manner in which the court of appeals applied the provisions of the Jury Selection and Service Act and the local jury selection plan to the circumstances of this case is not a question that merits review by this Court.[6]

2. Petitioners in No. 76-1314 argue (Pet. 47-52) that Roosevelt Nabors, a government informant, and Ruth Ann Burt, who testified as a government witness at trial, were called before the grand jury, after petitioners had been indicted, for the sole purpose of preparing the pending indictments for trial. As its recent decision in *United States* v. *Doss*, 545 F. 2d 548, 552 (C.A. 6), indicates,

[5]As we pointed out in our brief in opposition to the petition for a writ of certiorari in *McNeal* (No. 74-26), a copy of which we are sending to petitioners, the voter registration list for the 1968 federal primary election, held on August 6, 1968, was not available on August 1, 1968, when the filling of the master jury wheel was begun. Thus, the list for the 1966 federal general election was the most recent available list.

[6]*United States* v. *Guzman*, 468 F. 2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937, and *United States* v. *Blair*, 470 F. 2d 331 (C.A. 5), certiorari denied *sub nom. Crews* v. *United States*, 411 U.S. 908, upon which petitioners rely, do not conflict with the decision below because they concerned the requirements of different local plans. Moreover, in each case the challenge to the jury selection procedure was rejected.

In the supplemental addendum to their petition for a writ of certiorari, petitioners in No. 76-1314 contend that there is a conflict between two recent decisions of the United States District Court for the Eastern District of Michigan. In those cases, however, the challenges to the jury selection process were based upon the failure to refill the master jury wheel every two years, as was then required by the local plan, and are therefore different from any of the issues that petitioners raise with regard to the selection of the grand jury that indicted them. In any event, any conflict between decisions of district judges in the Sixth Circuit should be resolved by the court of appeals. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.

the court of appeals has recognized that the government may not use the grand jury as "a discovery instrument to help the government prepare evidence to convict an already indicted defendant." Here, however, the court concluded, after an examination of the record, that petitioners "have presented nothing beyond their own unproved suspicions to prove that Burt and Nabors were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictments for trial" (Pet. App. 12a).[7] Further review of that factual determination is not warranted. Moreover, petitioners have not shown how they were prejudiced by the grand jury appearances of Nabors and Burt. See *United States* v. *Keen*, 509 F. 2d 1273, 1274-1275 (C.A. 6); *United States* v. *Braasch*, 505 F. 2d 139, 147 (C.A. 7), certiorari denied, 421 U.S. 910.[8]

3. Petitioners in No. 76-1314 contend (Pet. 53-57) that, after the indictments in these cases had been returned, a government attorney and Drug Enforcement Administration agents improperly met with co-defendant Blair, without notifying Blair's attorney, to explore the possibility of an immunity agreement. As the court of appeals observed (Pet. App. 21a), however, this meeting was arranged primarily by Blair's former common-law wife, Ruth Ann Burt, who was not then under indictment, rather than by the government. In these circumstances,

[7]The court of appeals also observed that the grand jury could legitimately inquire further into the crimes, despite the return of indictments, in order to determine whether other persons were involved (Pet. App. 12a). Thus, there is no conflict with *Beverly* v. *United States*, 468 F. 2d 732 (C.A. 5), which expressly sanctioned that use of the grand jury. *Id.* at 743.

[8]We note in addition that petitioners did not raise this issue in the district court (Pet. App. 12a).

the government attorney and D.E.A. agents could reasonably have believed that Blair had made a free and intelligent decision to attend the meeting without informing his counsel, who was also retained by several other defendants. Even if the government's conduct may have infringed Blair's Sixth Amendment rights,[9] petitioners have no standing to challenge that violation. In any event, as both lower courts found (Pet. App. 21a), none of the evidence at trial was derived from any statements made at this meeting, and petitioners have failed to demonstrate how the government's conduct contributed to their convictions. See *Massiah* v. *United States*, 377 U.S. 201, 207.

4. Petitioners claim (Pet. 58-61; Pet., No. 76-1360, pp. 31-38) that evidence obtained by means of a court-ordered wire interception should not have been admitted at trial because the applications for the original interception and for an extension thereof were not authorized by the Attorney General or by a designated Assistant Attorney General, as required by 18 U.S.C. 2516(1). Specifically, petitioners apparently argue that the delegation of authority to Acting Assistant Attorney General Petersen to approve these applications was ineffective because the Attorney General's memorandum was not designated as an "order" and issued in a separate numbered series, within the meaning of Department of Justice regulations (28 C.F.R. 0.180).

The court of appeals correctly held (Pet. App. 24a) that it was unnecessary to consider the validity of this delegation of authority under Departmental regulations in light of the district court's finding that the applications

[9]The Court has recently declined to review co-defendant Blair's claim that the meeting violated his constitutional rights. See p. 4 n. 4, *supra*.

in this case had in fact been approved by Attorney General John Mitchell. The government introduced the affidavit of an executive assistant to Attorney General Mitchell, which stated that the applications had been approved by the Attorney General, and also introduced memoranda from the Attorney General to the Acting Assistant Attorney General indicating the Attorney General's authorization of the wire interception applications.[10] Since the Attorney General personally authorized the applications, the district court properly refused to suppress the evidence obtained. See *United States* v. *Acon*, 513 F. 2d 513 (C.A. 3); see also *United States* v. *Chavez*, 416 U.S. 562.

5. Petitioners in No. 76-1360 contend (Pet. 22-31) that the affidavit of D.E.A. Agent Ronald Garibotto in support of the government's application for an order authorizing electronic surveillance (Pet. App., No. 76-1360, pp. 89a-105a) failed to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The requirements of this section are satisfied when, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), the application and its supporting affidavit demonstrate to the court that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the

[10]Petitioners also argue that these memoranda should have been designated as "orders" pursuant to 28 C.F.R. 0.180. The court of appeals properly rejected this contention, since the statute does not require that the Attorney General's approval be given in any particular form, and even oral authorizations have been upheld. *United States* v. *Falcone*, 505 F. 2d 478, 481 (C.A. 3), certiorari denied, 420 U.S. 955; *United States* v. *Roberts*, 477 F. 2d 57, 61 (C.A. 7), certiorari denied, 417 U.S. 908.

identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied, *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8).

The court of appeals properly concluded that this test has been satisfied in this case (Pet. App. 25a-26a). Contrary to petitioners' contention, the affidavit did not rely completely on the agent's experience in other narcotics cases. The affidavit also averred that other investigative procedures had been employed but had not uncovered the full scope of the Jackson organization, that additional surveillance would "jeopardize the outcome of the investigation" and "do little to reveal the manufacture and distribution network" because "JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units," and that a confidential informant, referred to as S-1, had not been able to obtain any further information about the organization (Pet. App., No. 76-1360, pp. 102a-103a).[11]

Although petitioners allege that the government failed to tell the issuing judge that its informant could have penetrated more deeply into the organization, the district

[11]These allegations in the agent's affidavit distinguish this case from *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9), cited by petitioners. In addition, as we have recently observed in our brief in opposition in *Scully* v. *United States*, No. 76-5918, certiorari denied, April 18, 1977, a copy of which we are sending to petitioners, *Kalustian* is inconsistent with decisions of other panels of the Ninth Circuit. Since, however, this case is distinguishable from *Kalustian*, and the Ninth Circuit has not yet resolved the proper standard to be applied within its jurisdiction for assessing the adequacy of compliance with Section 2518(1)(c), there is no need for the Court to consider the issue at this time.

court correctly concluded that the informant was not a reasonable source of additional evidence in this case. In view of the secrecy and complexity of the Jackson organization, the court found that "it would be unlikely that [the informant] could learn the extent of the alleged conspiracy even if he could have, in fact, infiltrated the organization" and that "with his lengthy prior criminal record, [the informant's] reliability, both during the investigation and as a witness at trial, was marginal at best" (C.A. App. A 116). Moreover, as noted above, the past use of an informant was not withheld from the court, since Agent Garibotto's affidavit expressly stated that the government had received some of its information from confidential informant S-1 (Pet. App., No. 76-1360, p. 92a). The mere possibility that the informant might have been able to obtain additional information was immaterial, and the omission of this speculative fact from the affidavit did not affect the validity of the authorization. See *United States* v. *Vento*, 533 F. 2d 838, 849-850 (C.A. 3); *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909.

6. Petitioners in No. 76-1314 claim (Pet. 62-65) that their indictment and convictions on five separate counts of possession with intent to distribute a controlled substance was improper in view of the fact that all five quantities of narcotics had been recovered from different locations in the organization's Hubbell Street headquarters in the course of a single search.[12] The court of appeals properly concluded (Pet. App. 13a) that under Fed. R.

[12]The five counts involved are Counts 12-16. The sentences imposed upon each of the petitioners on Counts 13-16 are to run concurrently with the sentence imposed upon Count 12. (Pet. App. 3a-4a n. 1). All of the petitioners with the exceptions of Kilpatrick and Riggs were fined on each of the counts.

Crim. P. 12(f) petitioners had waived their claim of multiplicitousness by the failure to raise it either before trial or at the close of the government's case, at which time the facts upon which the separate counts were based could have been adduced.

In any event, petitioners' argument is without merit. Two of the counts involved separate quantities of heroin hydrochloride of different strengths (681.80 grams at a strength of 19.3 percent and 2,589.93 grams at a strength of 58.1 percent). The other three counts involved separate quantities of cocaine hydrochloride of different strengths (659.66 grams at a strength of 15.8 percent, 45.30 grams at a strength of 5.1 percent and 14.66 grams at a strength of 32.7 percent). Moreover, each quantity was found in a separate place in the Hubbell Street premises. In these circumstances, petitioners' possession of the five separate batches of narcotics constituted different offenses (compare *United States* v. *Privett*, 443 F. 2d 528 (C.A. 9), with *United States* v. *Williams*, 480 F. 2d 1204, 1205 (C.A. 6)), and petitioners could properly have been convicted on each count.

7. Petitioners contend (Pet. 66-69; Pet., No. 76-1360, pp. 38-42) that the district court improperly applied the rule of *Pinkerton* v. *United States*, 328 U.S. 640, so as to find each conspirator guilty of all the substantive offenses committed by each of the other co-conspirators.[13] Petitioners do not

[13]Contrary to the assertion of the petitioners in No. 76-1314 (Pet. 66), *Pinkerton* did not hold that a member of a conspiracy cannot be held responsible for the crimes committed by his co-conspirators unless those crimes are listed in the indictment as overt acts done in furtherance of the conspiracy. As the Court stated in *Pinkerton* (328 U.S. at 647), "[a]n overt act is an essential ingredient of the crime of conspiracy * * * . If that can be supplied by the act of one conspirator, we fail to see why the same *or other acts* in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense" (emphasis added).

challenge the sufficiency of the evidence to sustain their conspiracy convictions. Rather, they suggest that some of the substantive offenses for which they were convicted took place before they had entered the conspiracy. However, the earliest substantive offense of which petitioners were convicted occurred on October 22, 1971, and the findings of the district judges clearly established that each of the petitioners had become part of the conspiracy well before that date.[14] Thus, none of the petitioners was convicted of crimes occurring prior to his entry into the conspiracy.[15]

Nor is there any merit to the suggestion that this Court should re-examine the *Pinkerton* rule. In the more than 30 years since *Pinkerton* was decided this Court has not questioned its continued validity or the wisdom of its rationale.[16]

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[14]See C.A. App. A 152-153, 169-174, 181-186, 190.

[15]Once it is shown that a defendant has joined a conspiracy it is presumed that he has continued as a member until he affirmatively withdraws. See, *e.g.*, *United States* v. *Cullen*, 499 F. 2d 545, 547 (C.A. 9); *United States* v. *Goldberg*, 401 F. 2d 644, 648 (C.A. 2), certiorari denied, 393 U.S. 1099. The burden of establishing withdrawal is on the defendant. *United States* v. *Pearson*, 508 F. 2d 595, 597 (C.A. 5), certiorari denied, 423 U.S. 845; *United States* v. *Borelli*, 336 F. 2d 376, 388 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960.

[16]Indeed, the Court recently refused to consider an identical challenge to the *Pinkerton* rule by co-defendant Hurt. See p. 4, n. 4, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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*Acting Solicitor General.**

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MAY 1977.

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*The Solicitor General is disqualified in this case.

DCJ-1977-05

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